Supreme Court, U. S.
FILED
JAN 29 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1185

LUCY M. SLEDGE, *et al.*,
Petitioners

v.

J.P. STEVENS & CO., INC., *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Counsel Listed Inside Front Cover]

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Lucy M. Sledge, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this case on October 4, 1978.

OPINIONS BELOW

The opinion of the court of appeals is reported at 585 F.2d 625 and is reproduced in the Appendix at pp. 1a-50a.

The opinion of the district court on liability is reported unofficially at 16 Fair Employment Practice Cases ["FEP Cases"] 1652 and at 10 CCH Employment Practices Decisions ["E.P.D."] ¶ 10,585. The opinion is reproduced in the Appendix at pp. 53a-108a.

The decree entered by the district court is reported unofficially at 16 FEP Cases 1679 and at 12 E.P.D. ¶ 11,047. The decree is reproduced in the Appendix at pp. 111a-132a.

The district court's original order prohibiting the parties and their counsel from contacting class members without express leave of court has not been reported, but is reproduced in the Appendix at p. 144a.

The district court's order requiring that class members be provided with a specified form of notice, and that they be required to file claim forms, has not been reported in its entirety. It is reproduced in the Appendix at pp. 135a-141a. The district court's order denying plaintiffs's motion to amend that order, and denying plaintiffs' application for leave to contact class members and advise them of their rights with respect to the claim-filing requirement, has not been reported. It is reproduced in the Appendix at p. 142a.

JURISDICTION

The decision of the court of appeals was entered on October 4, 1978. App. 1a. The court of appeals denied petitioners' petition for rehearing and suggestion for rehearing *en banc* on November 1, 1978. App. 51a. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where a district court finds classwide employment discrimination of a type not likely to make class members aware that there has been discrimination against them, does its order barring plaintiffs and their counsel from contacting the class members they represent, for the purpose of informing and advising them as to their rights, while simultaneously requiring class members to file nonfunctional claim forms stating their belief that they have been discriminated against, on pain of losing forever all rights to back pay:

> (a) violate the First Amendment rights of counsel, plaintiffs and of the class announced by this Court in the line of cases beginning with *NAACP* v. *Button*, 371 U.S. 415 (1963) and most recently reaffirmed in *In re Primus*, 56 L.Ed.2d 417 (1978), where class counsel are affiliated with civil rights organizations which meet the standards of these cases?
>
> (b) violate the Fifth Amendment rights of class members to due process, by requiring them to make a legal decision while effectively depriving them of the services of class counsel, which would otherwise be available free of charge to them?
>
> (c) frustrate the central statutory purposes of back pay awards under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*?

2. Whether the district court's requirement that class members "opt into" the case by filing functionless claim forms, on pain of losing forever all rights to back pay, violates the provisions of Rule 23, F.R.Civ.P., and frustrates the purposes of the 1966 Amendments to Rule 23.

3. Whether the form of notice approved by the district court is so inadequate and misleading as to de-

prive class members of their right to due process of law, as declared by previous decisions of this Court.

4. Whether the court of appeals' vacation of the hiring and initial assignment quotas entered by the district court improperly invaded the discretion of the district court in framing a decree, and improperly took from the decree some of its capacity to expedite relief, where the primary effect of such relief was only to stop ongoing subjective discrimination in employment.

5. Whether the court of appeals held correctly that 42 U.S.C. § 1981 is limited by the provisions of § 703(h) of the Civil Rights Act of 1964, and thus cannot be used to challenge a bona fide seniority system which perpetuates the effects of prior discrimination.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULE INVOLVED

The First Amendment to the Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Fifth Amendment to the Constitution states in pertinent part:

> No person shall . . . be deprived of . . . property, without due process of law . . . .

42 U.S.C. § 1981 provides in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .

The pertinent provisions of § 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), are:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

The pertinent provisions of § 706(g) of the Civil Rights Act of 1964, 78 Stat. 261, which were in effect at the time this suit was filed and which govern this proceeding, are:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). . . .

The pertinent provisions of Rule 23,F.R.Civ.P., are:

> (c)(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through

reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

* * *

(d) In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; . . . (5) dealing with similar procedural matters. . . .

STATEMENT

(a) Introduction

The petitioners are black persons who are either unsuccessful applicants for employment with the respondent J.P. Stevens & Co., Inc., or are present or former employees of J.P. Stevens, at the company's facilities located in and near Roanoke Rapids, North Carolina. The respondent Textile Workers Union of America, AFL-CIO, CLC, intervened as a plaintiff in the case subsequent to the district court's decision on liability, for the purpose of assisting the district court in the remedial stage of the case. The respondent union was not involved in any of the practices which have been challenged as discriminatory.

Following exhaustion of the administrative prerequisites to suit under Title VII, this case was filed as a class action on October 2, 1970. The Complaint alleged discrimination in violation of Title VII and of 42 U.S.C. § 1981. On June 17, 1971, the district court certified the case as a class action and *sua sponte* prohibited all parties and their counsel from "directly or indirectly, orally or in writing" contracting class members about the action absent prior approval of the district court. App. 146a. The district court subsequently gave plaintiffs permission to contact class members for the limited purpose of locating witnesses and obtaining trial testimony.

The case was tried to the district court from November 6-10, 1972. The district court deferred its decision until the decision by this Court of *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), a case which had also arisen in the Eastern District of North Carolina and which had been tried before the same judge.

On December 22, 1975, the district court decided questions of liability. It held that the company had violated Title VII and § 1981 by classwide racial discrimination in hiring, initial assignments, promotions, layoffs, recalls, and the imposition of a longer waiting period, from the date of application to the date of hire, on black female applicants than on white female applicants. The company's departmental seniority system was held unlawful under Title VII and § 1981 because it perpetuated the effects of past discrimination. App. 53a-108a, 110a (amendment of finding 102).

The court of appeals affirmed all of the district court's findings of discrimination, with the exception of the district court's finding of discrimination in the defendant's use of departmental seniority. That finding was reversed on the ground that § 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), immunized from challenge a departmental seniority system that was not instituted with a discriminatory purpose, but which perpetuated the effects of past discrimination. The court of appeals held that the immunity applied to the § 1981 count as well as to the Title VII count. App. 14a-15a.

(b) The Claim-Filing Requirement

The evidence of record shows that this was not a case in which black applicants and employees had been alerted to the fact of discrimination by any overt bias on the company's part.[1] The evidence of record is based primarily on evidence of statistical disparities, coupled with evidence of standardless practices.[2] Without specific knowledge of these statistics, black applicants and employees have neither any means of knowing that they have been discriminated against, nor relevant information to provide to the court for the determination of their entitlement to back pay. Most of the information necessary for back pay claims—evidence of applications, qualifications, hires, job assignments, pay rates, etc.—is in the company's personnel files.

[1] Conclusion 8, App. 98a-100a.

Over petitioners' opposition, the district court on September 10, 1976 ordered class members to file proof-of-claim forms as a condition of preserving their rights to back pay. Failure to file the claim form does not simply bar recovery in this action; it destroys the underlying right to back pay. The claim-filing requirement was not limited to specific instances in which information from an applicant or employee is necessary to determine the amount of back pay to which he or she is entitled,[3] as petitioners had suggested, and the claim form itself does not request such information. Instead, the claim form merely asks three "Yes" or "No" questions: (a) if an unhired applicant, does the class member contend "that because of your race and color the Company failed to hire you?"; (b) if an employee, does the class member contend "that because of your race and color the company failed to place or promote you as you were seeking?"; and (c) "Are you willing to submit and respond to question-

[2] *Id.*, Findings 20-24, App. 69a.

[3] For example, information as to interim earnings is necessary to determine the amount of back pay in cases of hiring discrimination. For black employees, interim earnings are stated in the company's payroll records.

ing . . . at Raleigh, North Carolina, or at some other appointed place upon notification, with regard to all matters legally pertinent to any claim you make?". App.140a. The claim form implies that it is necessary to have made a specific application for a higher-paid job in order to be entitled to back pay, although the district court had expressly found that notices of job vacancies were not posted and that employees *could not apply* for promotions.[4] The claim form also does not allow responses for all claims giving rise to a right to back pay. The district court, for example, had found that the company imposed a longer waiting time, from date of application to date of hire, on black women then on white women.[5] Such a claim clearly gives rise to a right to back pay, but it is not included on the form and class members harmed by this practice will still lose their rights to back pay if they fail to file the form.

The Notice accompanying the claim form does not provide any information about the company practices found to be discriminatory, the types of facts giving rise to an entitlement to back pay, the presumption of discrimination against class members flowing from the classwide findings of discrimination, or the availability of counsel to advise them without charge to them. App. 137a-139a. Petitioners moved to amend the Notice to provide such information, and moved to amend the claim form so that misleading and confusing language would be eliminated, and so that the form would simply state "I believe that I may have a claim for back pay . . . and I want to press my claim. If asked, I will come to the Court . . . and testify about

[4] Finding 15, App. 68a; conclusion 8(b), App. 99a.

[5] Findings 89-90, App. 93a; conclusion 8(1), App. 100a.

my claim."[6] Petitioners' motion also requested leave for their counsel to contact class members so as to advise them of their rights. On October 1, 1978, the district court denied petitioners' motion, stating that "while it finds some of plaintiffs' proposals unobjectionable from a legal standpoint", they would be denied in the discretion of the district court. App. 142a.

The orders imposing the claim-filing requirement and denying petitioners' motion were appealed under 28 U.S.C. § 1292(b). The court of appeals affirmed these orders. The denial of leave for counsel to contact class members was necessarily affirmed, but it was not separately discussed. App. 49a-50a.

(c) The Decree

The district court approached the framing of injunctive relief with great care, ordering the parties to confer and undertake to reach agreement, allowing petitioners to communicate with class members to obtain their suggestions for relief, and re-opening the record to allow the receipt of additional evidence of the company's employment patterns after the close of trial. After several conferences and changes in their proposed decree, petitioners submitted a proposed decree which the company opposed. The union supported the decree as a package, urging that it was as fair as possible to whites, given the extensive record of discrimination.

[6] Plaintiffs' Motion to Amend and Supplement the Order Concerning Back Pay Entered Herein on September 10, 1976 and attached form of proposed Order. The motion expressly preserved petitioners' objections to the claim-filing requirement.

In the areas of relief pertinent to this petition, the decree tracked the evidence closely. The district court found from the evidence that the company paid little attention to qualifications in its hiring, and that most job categories in its plants can be filled by any willing, able-bodied person without regard to experience or education.[7]

The company has never given its officials any objective standards to follow in making hiring and initial assignment decisions.[8] Over a three-year period, white applicants were hired at twice the rate of blacks because of subjective discrimination by company officials.[9] Before entering its decree, the district court received evidence indicating that these patterns had continued in full force during the three-year period between the date of trial and the date of decision. The decree ordered the company to make bona fide offers of employment to the same ratio of black male applicants as it made to white male applicants, and entered a similar provision for black and for white females.[10] While affirming the district court's findings of fact and conclusions of law, and while expressly approving the district court's use of racial disparities in applicant/hire ratios as a measure of discrimination,[11] the court of appeals vacated the district court's order to eliminate the disparity, on the ground that such an order was a quota which could not be imposed until

[7] Finding 9, App. 66a-67a; conclusion 8(c), App. 99a; adopted findings 26-31, 39-62. App. 104a, 105a-108a.

[8] Findings 9, 20, App. 66a-67a, 69a; conclusion 8(b), App. 99a.

[9] Findings 21-31, App. 69a-72a; conclusions 8(a)-8(c), App. 98a-99a.

[10] Decree, ¶ 5, App. 114a.

[11] App. 12a note 16, 15a.

lesser relief had been tried and had failed to be effective.[12]

Similarly, the district court found that the defendant had deliberately reserved clerical and weaving jobs for whites.[13] Its decree ordered that blacks be placed in clerical jobs, and that black males be placed in weaver jobs, on an alternating black/white basis until 40% of the incumbents were black. Both the 50% placement rate and the 40% goal were expressly tied to record evidence showing the rate of black placement that would have been expected in the absence of ongoing racial reservation of these jobs.[14] The court of appeals affirmed the findings that these jobs had been reserved for whites, but vacated the relief as a quota which could not be imposed until lesser relief had been tried and failed. App. 15a, 33a-42a, 44a.

[12] App. 32a-33a, 35a-42a, 44a. The court of appeals' belief that hiring discrimination had been ameliorated is not supported in the record. After the decision on liability, additional evidence from company records was received. The uncontradicted evidence showed that in the three years from the end of the trial in 1972 to the decision in 1975, 81% of white male applicants had been hired, but only 44% of black male applicants had been hired. In that period, 61% of white female applicants had been hired, but only 27% of black female applicants. (Plaintiffs' exhibit 133). *Cf.* the district court's conclusion 9(c), App. 100a-101a.

[13] Findings 32-39 (clerical jobs) and 44-49 (weaving jobs until May 1969, when the racial reservation of this job was lifted as to black females, and weaving jobs for males thereafter), App. 72a-74a, 75a-76a, conclusions 8(d) and 8(e), App. 99a.

[14] Decree, ¶¶ 10, 15, App. 115a-116a, 117a. *See also* ¶ 11, App. 116a.

In the same vein, the district court found subjective racial discrimination against blacks in initial assignment.[15] Its decree ordered the company to make initial assignments in such a way that there would be no patterns of racial disparities in such assignments, as measured by pay rates.[16] The court of appeals again affirmed the findings but vacated the relief.[17]

The district court ordered other quota provisions[18] which were vacated on appeal.[19] Because the remaining provisions of the decree provide relief which should eliminate the opportunity for company officials to engage in subjective promotional discrimination, these provisions are not included within the scope of this petition. Hiring and initial assignment decisions cannot be made on the basis of seniority, however, and relief controlling the results of subjective decisions is necessary in these areas.

[15] Findings 45-47 (weavers), 56-59 (warehousemen), 62 and 70(b) (males hired in the year of trial), and 71-76 (assignments of black males to different departments), App. 75a-76a, 78a, 79a, 86a-88a; conclusions 8(d)-8(f), 8(h) and 8(j). App. 99a, 100a.

[16] Decree, ¶ 28, App. 124a-125a.

[17] The court of appeals did not specifically refer to paragraph 28 of the decree, but did state that it was reversing all quotas. App. 44a.

[18] Decree, ¶¶ 16 and 29-30 (insofar as these paragraphs relate to promotions), App. 117a-118a, 125a-126a.

[19] App. 42a-44a.

REASONS FOR GRANTING THE WRIT

A. The Prohibition on Counsel-Initiated Contacts With Class Members Is In Conflict With The Decisions Of This Court and With The Decisions of The Third Circuit

In a series of cases, this Court has made clear that the First Amendment protects the action of an attorney affiliated with an organization in informing nonclients of their rights, and in inviting their participation in litigation, where such litigation would further the organization's goals and is not undertaken primarily for pecuniary gain. *NAACP* v. *Button*, 371 U.S. 415, 421-22, 428-29, 437 (1963); *Bhd. of R.R. Trainmen* v. *Virginia State Bar*, 377 U.S. 1, 3-8 (1964); *United Mine Workers* v. *Illinois State Bar Ass'n*, 389 U.S. 217, 219-22 (1967); *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576, 585 (1971); *In re Primus*, 56 L.Ed.2d 417, 428, 433-34, 437-38 (1978). If the First Amendment gives an attorney the right to contact total strangers and to urge them to participate in litigation, then the plaintiffs representing a certified class and their counsel—who are affiliated with the NAACP Legal Defense and Educational Fund and the Lawyers' Committee for Civil Rights Under Law and are representing the plaintiffs to further the goals of those organizations—must surely have a First Amendment privilege to contact class members, to whom they owe a fiduciary duty,[20] both

[20] *Shelton* v. *Pargo*, 582 F.2d 1298, 1305-06 (4th Cir., 1978); *Greenfield* v. *Villager Industries*, 483 F.2d 824, 832 (3rd Cir., 1973). Class counsel are representing the plaintiffs and the class members without charge to them for their services or for the costs of litigation. Counsel's sole hope of payment lies in a court award of fees and costs.

to provide them with relevant information and to advise them of their rights.

The district court's order was seemingly based on the theory that advising class members of their rights would lead them to assert those rights. While petitioners had represented in the district court that they would not seek to advise class members as to whether they should file a claim form—a concession deemed necessary in order to have a realistic prospect of having *any* communications approved—this Court has held in *Primus* and its predecessors that precisely such activity is protected and may not be subjected to an overbroad blanket prohibition. Moreover, the Third Circuit has held that urging the participation of proposed class members in a class action tends to effectuate, not defeat, the purposes of Rule 23. *Coles* v. *Marsh*, 560 F.2d 186, 189 (3rd Cir., 1977), *cert den.*, 434 U.S. 985 (1977).

The district court's ban on plaintiff- and counsel-initiated communications with class members, particularly as it bars class counsel from providing relevant information drawn from company records and court proceedings to class members who must decide whether to assert a claim, is both a prior restraint on speech and is overbroad. *NAACP* v. *Button*, *supra*, 371 U.S. at 438. It is too plain from the decisions of this Court to require further citation that an order imposing a prior restraint must be couched in the narrowest possible terms. The blanket prohibition affirmed below disregards this principle. Moreover, the Third Circuit has held that the "prior restraint" doctrine applies to communications between plaintiffs and class counsel, on the one hand, and members of the class, on the other. *Rodgers* v. *United States Steel Corp.*, 536 F.2d

1001, 1007-09 (3rd Cir., 1976). There the court reversed, as an unjustifiable prior restraint, an order barring plaintiffs from using a document, which they had not obtained in the discovery process, to counsel each of the approximately 600 black employees in that case with respect to the back pay tenders and waiver forms that would be coming to them as part of the nationwide settlement of Title VII charges between the steel industry and the United States.[21]

B. The Opinion Below Decides Important Questions As To The Construction of Rule 23, And As To The Compliance of Such a Construction With The Due Process Clause, Which Should Be Decided By This Court. The Opinion Also Conflicts With The Decisions Of Other Courts Of Appeals.

1. *The Claim-Filing Requirement*

Prior to the adoption of the 1966 Amendments to the Federal Rules of Civil Procedure, Rule 23(b)(3) was essentially a "permissive joinder" device, under which all persons who did not intervene in some fashion before or after judgment were automatically excluded from the class.[22] The practical effect of the "opt-in" requirement was to reduce the liability of defendants sued by a class, by immunizing them from the meri-

[21] The MANUAL FOR COMPLEX LITIGATION (1978) recommends a Sample Pretrial Order which allows parties and counsel to contact class members wthout prior restraint whenever the communication is assertedly protected by a constitutional right. Part II, Appendix, § 1.41, reprinted in 1 (Part 2) Moore's FEDERAL PRACTICE (1978) at 227-28. No such provision is contained in the orders entered below.

[22] Advisory Comm. Note, 34 F.R.D. 325, 387-88 (1964); *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 550 (1974).

torious claims of people who did not understand the rights that they may have had, did not know the facts constituting a claim, or did not realize the legal significance of the facts which they did know. Because of widespread concern that this was the practical effect of "opt-in" requirements, the Advisory Committee on the Federal Rules of Civil Procedure proposed, and this Court in 1966 adopted, amendments of Rule 23(b)(3) which repealed the former requirement that the described persons must "opt-in" to become class members. The Advisory Committee also added a provison that the described persons would automatically be class members unless they opted out.

Professor Kaplan, then the Reporter to the Advisory Committee, explained the legislative policy choice behind the 1966 Amendments as based on the perception:

> . . . that requiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable.[23]

It is beyond the proper exercise of a lower court's powers to attempt to repeal this policy choice by imposing nonfunctional claim-filing or opt-in requirements. For this reason, the MANUAL FOR COMPLEX LITIGATION specifically provides that "[r]equiring a

[23] Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV.L.REV. 356, 397-98 (1967).

proof of claim . . . under pain of exclusion or dismissal is the same thing as requiring class members to opt in," and that such requirement, even if based on the discretionary-notice provisons of Rule 23(d)(2) "must . . . under Rule 23 as it is presently written, be regarded as a clear abuse of discretion."[24] The Fourth Circuit's affirmance of a functionless claim-filing requirement is in conflict with decisions of the Fifth and Seventh Circuits that Rule 23 does not authorize "opt-in" notices not designed to elicit indispensable information. *Robinson* v. *Union Carbide Corp.*, 544 F.2d 1258, 1261 (5th Cir., 1977), *cert. den.*, 434 U.S. 822 (1977); *Clark* v. *Universal Builders*, 501 F.2d 324, 340 (7th Cir., 1974), *cert. den.*, 419 U.S. 1070 (1974).

2. *The Prohibition on Plaintiff- and Counsel-Initiated Contacts With Class Members*

The district court's order defeats the requirement of Rule 23(a)(4) that the class representatives "fairly and adequately protect the interests of the class." It is not possible to discharge this duty if class counsel are unable to contact class members and provide them with relevant information, and to advise them, at the precise moment when such information and advice are most important. The purpose of the 1966 Amendments to the class action rules was to protect "small claims held by small people",[25] and this purpose is violated by an order enforcing their isolation from knowledge of their own case and from knowledge of their rights. *Cf. Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966). The district court's order de-

[24] MANUAL § 1.45 (1978), 1 (Part 2) Moore's FEDERAL PRACTICE at 59-60. The Manual does not disapprove of functional filing requirements after adjudication or settlment, *Id.*

[25] Kaplan, *supra*.

prives class members of their right to due process by requiring them to make a legal decision while depriving them of available information necessary to an informed decision, and while depriving them of the available assistance of class counsel.

3. *The Form of Notice*

This Court has repeatedly held that the Fifth Amendment's due process clause requires the text of a Rule 23 notice to contain all information reasonably necessary to an informed choice, and that the "best notice practicable" be given. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974). The form of notice herein, which tells class members nothing of the case and nothing of their rights, which misleads them into thinking—contrary to the decision of this Court in *Int'l. Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 363-68 (1977), that it is in all cases necessary to have applied for a promotion in order to be entitled to relief under Title VII, does not meet the standards set by this Court.

C. The Claim-Filing Requirement and the Gag Order Frustrate the Central Statutory Purposes of Title VII Back Pay Awards, As Declared By This Court

In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975), this Court held that the central statutory purposes of Title VII back pay awards were (1) to make the victims of discrimination whole, and (2) to eradicate discrimination throughout the economy by providing employers with an incentive to examine their own practices and eliminate dubious practices

without the need for litigation. Using the class action rules as an instrument for the dismissal with prejudice of valid claims of discrimination, in situations where most victims are not fully aware of their victimization, frustrates these purposes.

D. The Reversal of the Hiring Quotas Conflicts With the Decisions of This Court Requiring That Full Relief Be Entered Where Racial Discrimination Is Proven

The hiring quotas reversed by the court of appeals are far less extensive than the types of relief usually described as quota relief. All that they accomplish is to end ongoing subjective discrimination, and they speak precisely to the nature of the violation. The district court found that racial disparities in hiring rates were unlawful, for example, and simply ordered the company to avoid such disparities in the future. Relief which does not go at least that far cannot be considered complete relief, as that term has been used by this Court. *Albemarle Paper Co., supra*, 422 U.S. at 418. In *United States* v. *Montgomery County Bd. of Ed.*, 395 U.S. 225, 234-36 (1969), this Court held that the Fifth Circuit's reversal of a faculty quota in a school desegregation case was not proper because it would delay the goal of achieving a fully desegregated school system. As with the court of appeals here, the Fifth Circuit had "many arguments" against fixed mathematical ratios. And, as in the case at bar, the modifications ordered by the court of appeals "take from the order some of its capacity to expedite" relief.

Petitioners filed their EEOC charges in 1969. They need relief that "promises realistically to work, and promises realistically to work *now*." *Cf. Green* v.

County School Bd. of New Kent County, 391 U.S. 430, 439 (1968) (emphasis in original).

E. The Decision That § 703(h) of the Civil Rights Act of 1964 Immunizes the Defendant's Seniority System From Challange Under 42 U.S.C.§ 1981 Raises An Important Question of Federal Law That Should be Resolved By This Court

This Court has held that Title VII and 42 U.S.C.§ 1981 present significantly different remedies for employment discrimination, and that the intent of Congress has been to keep these remedies distinct. *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 458-60 (1975); *cf. Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47-50 (1974). The holding of the court of appeals that the passage of Title VII somehow restricted the scope of the Civil Rights Act passed ninety-eight years before is inconsistent with the independence of these remedies.

In fact, there is strong evidence that Congress looked to § 1981 to afford greater protection than was available to employees under Title VII. In passing the Equal Employment Opportunity Act of 1972, Congress refused to amend Title VII to make it the exclusive remedy for employment discrimination. 118 Cong. Rec. 3173 (1972). As the debates show, Congress believed that § 1981 reaches discrimination not within the reach of Title VII and that it desired to preserve § 1981 as an independent remedy for the sake of the difference in coverage. See 118 Cong. Rec. 3370, 3962-63 (1972) (remarks of Sen. Javits); 118 Cong. Rec. 3372, 3964 (1972) (remarks of Sen. Williams, floor manager of S. 2515). As explained by Sen. Javits, the necessity of having to make a number of political compromises to gain passage of Title VII in 1964 had weakened it, and other remedies, including § 1981, were necessary to fill the gaps. 118 Cong. Rec. at 3962-63.

In order to hold that § 1981 can be used to challenge a "bona fide" seniority system, the Court must also hold that it is not necessary to prove discriminatory purpose in establishing a violation of § 1981. That question is pending before this Court in *County of Los Angeles* v. *Davis*, No. 77-1553.[26] The precise question raised herein as to the effect of § 703(h) of the Civil Rights Act of 1964 on § 1981 is also presented by *Johnson* v. *Ryder Truck Lines*, No. 78-179, pending on petition for certiorari.

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[26] The Lawyers' Committee for Civil Rights Under Law has filed an *amicus* brief in that case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 29, 1979

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1988

LUCY SLEDGE, et al.,
Individually and on behalf
of all others similarly situated,
Appellees.

TEXTILE WORKERS UNION OF AMERICA,
AFL-CIO, CLC,
Intervenor-Appellee.

v.

J. P. STEVENS & CO., INC.,
Appellants.

No. 76-2150

LUCY SLEDGE, THOMAS HAWKINS, HERMAN JONES,
MABLE MOODY MILES, CLARA PURNELL, PATRICIA
PURNELL, LUKE PHIPPS AND MARIE ROBINSON,
Appellants.

and

TEXTILE WORKERS UNION OF AMERICA,
AFL-CIO, CLC,
Intervenor-Appellee,

v.

J. P. STEVENS & CO., INC.,
Appellee.

No. 76-2303

LUCY M. SLEDGE, et al,
Individually and on behalf of all others similarly situated,

Appellants,

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, CI C,

Intervenor-Appellee,

v.

J. P. STEVENS & COMPANY, INC.,

Appellee

Appeals from the United States District Court for the Eastern District of North Carolina, at Wilson. F. T. Dupree, Jr., District Judge.

Argued March 16, 1977 Decided October 4, 1978

Before CRAVEN, Circuit Judge,* FIELD, Senior Circuit Judge, and WIDENER, Circuit Judge.

Whiteford S. Blakeney (Blakeney, Alexander & Machen on brief) for Appellant in 76-1988 and for Appellee in 76-2303; Richard T. Seymour (T.T. Clayton, Clayton & Ballance; Richard B. Sobol; Jack Greenberg, O. Peter Sherwood; Julius L. Chambers, Chambers, Stein, Ferguson & Becton on brief) for Appellants in 76-2303; Jonathan R. Harkavy (Smith, Patterson, Follin, Curtis & James; Arthur M. Goldberg, Amalgamated Clothing and Textile Workers Union, AFL-CIO on brief) for Appellee in 76-1988 and 76-2150; (Abner W. Sibal, General Counsel; Joseph T. Eddins, Associate General Counsel; Charles L. Reischel, Assistant General Counsel; and Paul Mirengoff, Attorney, Equal

Employment Opportunity Commission on brief) as Amicus Curiae.

* Judge Craven participated in oral argument but died before the opinion was prepared.

OPINION

FIELD, Senior Circuit Judge:

An across-the-board assault upon the employment practices of the J. P. Stevens & Company, Inc., was initiated on October 2, 1970, when thirteen black residents of North Carolina filed this action seeking individual and class relief against the company.[1] The individual plaintiffs, past and present employees of J.P. Stevens' Roanoke Rapids, North Carolina, operations, as well as unsuccessful applicants for work, claimed that the defendant unlawfully discriminated against them in particular and against blacks in general in hiring new employees and assigning them to work; in promoting its workers to more desirable and higher-paying jobs; in recalling employees from layoff; and in fixing the terms and conditions of individuals' employment. For these and other alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, and Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981, they sought injunctive and other relief, including back pay.[2]

Recognizing that the defendant maintains scores of facilities in five southern states, and that the particular

[1] It was alleged in the complaint, admitted in the answer, and to some extent demonstrated at trial that all but three of the plaintiffs had earlier lodged charges against Stevens with the Equal Employment Opportunity Commission. The first of such charges were filed with EEOC on September 5, 1969. Right-to-sue letters were received by all but one of the complainants.

[2] The litigation was commenced prior to the amendment of Title VII by the Equal Employment Opportunity Act of 1972, 86 Stat. 103.

grievances of the named plaintiffs related only to Stevens' eight plants and three offices in Roanoke Rapids, the district court conditionally certified the action under Rule 23 as a class action, but set reasonable bounds to the litigation by designating the plaintiffs as representatives of a class which consisted of "[a]11 Negroes employed at all the Roanoke Rapids plants of J. P. Stevens & Company, Inc., on and after October 2, 1967," and "[a]ll Negroes who have applied for employment at said Roanoke Rapids plants since October 2, 1967, who claim to have been affected by the alleged racially discriminatory employment practices of the defendant."[3] All parties and their counsel were prohibited from initiating, without leave of court, communications of any kind concerning the case with actual or potential class members who were not formal parties.

Upon motion of the plaintiffs in which the defendant concurred, the district court bifurcated the proceedings, directing that resolution of the issue of the defendant's liability was to precede the determination of all questions primarily involving possible monetary relief for the class. Evidence as to liability was taken by the court, sitting without a jury, on November 6-10, 1972, and the plaintiffs introduced well over one hundred exhibits, many of them computer-generated statistical analyses of J. P. Stevens' employment practices. Plaintiffs also presented the testimony of the persons who prepared the statistical exhibits, two expert mathematical statisticians, two employees of the North Carolina Employment Security Commission, eight of the named plaintiffs, and several other Stevens

[3] A "Notice of Pendency of Class Action" was published in a Roanoke Rapids newspaper. It advised class members of the pendency and possible consequences of the action, of their right to seek exclusion from the class, and of the option they had of obtaining counsel to represent each class member personally at trial. The class designation was not challenged in the court below nor on appeal.

employees from Roanoke Rapids, including the defendant's personnel director, a data processing employee, and one departmental overseer. The defendant countered with six hand-tabulated statistical exhibits, the testimony of its administrative assistant to the general manager of the Roanoke Rapids operations, and the testimony of fourteen of its black employees. The court entertained briefs and arguments in the spring of 1973, but postponed decision until after the Supreme Court decided *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).

Extensive written findings of fact and conclusions of law were filed on December 22, 1975.[4] The court concluded that the claims of all the named plaintiffs should be dismissed since one of them had voluntarily withdrawn from the litigation and the other twelve had "failed to prove their individual claims of employment discrimination."[5] However, based upon precedent in this Circuit which it viewed as "an apparent anomaly in practice and procedure in employment discrimination class actions," the court ruled that the dismissal of the claims of the individual plaintiffs would not affect the action as to the unnamed

[4] Though officially unreported, they are published at 10 EPD ¶ 10,585.

[5] In the September 27, 1976, "Certificate Directing the Entry of Judgment With Respect to the Personal Claims of the Named Plaintiffs," it was stated that the effect of these dismissals was to prohibit the named plaintiffs from either participating in the class back pay determinations or from attempting to remedy at the back pay hearings the perceived evidentiary deficiencies in their claims. But an earlier-filed December 22, 1975, "Order of Dismissal," 10 EPD ¶ 10,585 at 6441, to which the judgment entered in accordance with the certificate refers, expresses a more limited view of the effect of the dismissal, stating that "[e]xcept with respect to the grounds upon which the respective individual claims are being dismissed, this order is without prejudice to the rights of the individual named plaintiffs to establish their membership in any class for which relief may be granted on other grounds."

class members. The allegation of classwide discrimination was thus considered on its merits, and Stevens was found to have engaged in unlawful employment practices against the class in violation of Title VII and Section 1981. Specifically, the court was of the opinion that a *prima facie* case had been established against the defendant, not by proof of any "specific, overt racially discriminatory employment practices," but by "statistical evidence and evidence of seemingly neutral practices."[6] The court held that Stevens had not met the burden of rebutting this *prima facie* showing.[7]

Having concluded that Stevens had violated the law and that the plaintiff class was entitled to relief, the court held that such relief should encompass (1) an injunction against

[6] Plaintiffs were found to have established discrimination in Stevens' employment practices by proof of: the defendant's reliance upon standardless, subjective conclusions in deciding which persons would be hired, promoted, and transferred; the disproportionately higher percentage of white than black applicants who were hired and of black than white new employees who were originally assigned to low-paying jobs; the reservation of supervisory, clerical, and other higher-paying positions for whites and of low-paying work for blacks; the disparities between the average hourly pay of white and black male employees; the use of a departmental seniority system which, if they chose to transfer to better jobs, disadvantaged blacks with regard to layoffs, recalls, and transfers; and the imposition upon black females of longer waiting periods between date of application and date of hire than were imposed upon whites.

[7] Without disputing their factual accuracy, the court rejected as legal defenses to the action the defendant's arguments that it had never barred blacks from employment; that many applicants of both races were not hired; that the percentage of blacks in the Stevens work force was rising; that the defendant had never fired any person on account of race; that Stevens' testing system for applicants was not discriminatory; that blacks had received some promotions; that records of the race of employees were not kept by the employer; and that the defendant had acted in good faith. The court also held that Stevens had shown no business justification for its discriminatory practices.

all racially discriminatory employment acts, omissions, and practices which the evidence had established; (2) back pay to members of the class from a date three years prior to the filing of the action on conditions later to be prescribed; and (3) an award of reasonable attorney's fees and costs. Following court-directed conferences which involved counsel for the parties as well as the Textile Workers Union of America (which represents some of the defendant's employees and was permitted to intervene solely to help fashion and effectuate a decree), the parties submitted their proposed decrees, after which the court heard objections to them and additional evidence was received.

On June 25, 1976, the district court entered a 31-page remedial decree which imposed a broad and detailed regimen of continuing affirmative obligations upon the defendant.[8] As a prefatory matter, the decree enjoined future acts of racial discrimination at the Roanoke Rapids facilities, but provided that Stevens would not be required to place any person in a job for which he is objectively unfit and cannot be made fit with reasonable training. The decree then prescribed strict racial ratios for future hiring, job placement, and promotions, and directed the defendant to eliminate racial disparities in earnings. Specific wage criteria for job assignments were defined, and it was ordered that departmental seniority for blacks be replaced by a constructive plant seniority plan. Stevens was also ordered to post job vacancies, establish job descriptions, and develop remedial training and recruiting programs. Additionally, job bidding procedures, red-circling of wages, and "bumping" standards were imposed. Certain expenses were awarded the plaintiffs, and procedural machinery was created to enforce the decree, including reporting and inspection provisions.

Turning finally to the matter of the back pay relief for which it had found as a matter of law the defendant would

[8] *See* 12 EPD ¶ 11,047.

be liable, the court postponed any specific decision on the amount of such relief or its distribution, choosing instead to first ascertain the names of all potential claimants and to require of each of them, under penalty of waiving their possible entitlement, an affirmative demonstration of a desire to seek relief. To this end the judge ordered, on September 10, 1976,[9] that a list of all class members be assembled from "all records and compilations available" and submitted to the court, and that the clerk mail to each such person a notice and a "Back Pay Questionnaire and Claim" form, copies of both the notice and the form to be made available at Stevens' facilities.[10] The court affirmed its earlier ruling that North Carolina's three-year statute of limitations governed the defendant's back pay liability, and that back pay would thus not be allowed to anyone for the period preceding October 2, 1967, which was three years prior to the filing of the class action complaint.[11] The ban on counsel-initiated communication with class mem-

[9] See 12 EPD ¶ 11,251.

[10] The notice essentially stated that the action had been filed and defined the plaintiff class. It related that although the claims of the individual plaintiffs had been denied, the court had found that members of the class had been discriminated against in violation of the law. It further advised that if the reader fell within the class, felt that Stevens failed to hire or promote him on account of his race, and wished to make a claim for back pay or monetary relief on that ground, he should file a claim before November 15, 1976, by filling in the accompanying questionnaire, signing it, and mailing it to the clerk of court, or else his claim would be forever barred.

The questionnaire asked three questions: (1) whether it was claimed that, due to race, Stevens failed to hire the person; (2) whether it was claimed that, due to race, Stevens failed to place or promote the person as desired; and (3) whether the claimant would submit to questions by the attorneys or the court.

Both documents were to be mailed to potential class members no later than October 15, 1976.

[11] *See* 12 EPD ¶ 11,249

bers remained in force, except that by the terms of the earlier decree communication would be allowed for the limited purpose of determining whether the terms of the injunction were being carried out.

These consolidated appeals bring into question almost every ruling of any consequence by the court below. In No. 76-2150, eight of the named plaintiffs appeal from the district court's dismissal of their individual claims against Stevens.[12] No. 76-1988 is an appeal by the defendant in which it contends that the court erred not only in permitting the action to proceed as to the class after the representative plaintiffs were dismissed, but also in finding that Stevens had engaged in unlawful employment practices. Additionally, Stevens challenges as an abuse of discretion the provisions of the trial court's decree.[13] The third appeal, No. 76-2303, is taken by the plaintiffs who contest the court-ordered back pay claim-filing requirement, the denial of their motion to amend the back pay order, and the limitation of the defendant's liability for back pay to the period of three years prior to the filing of this action.[14]

[12] The appeal is prosecuted under 28 U.S.C. § 1291, because the dismissals were embodied in a judgment and certified as final, under rule 54 (b), by the court below

[13] We have jurisdiction under 28 U.S.C. § 1292(a)(1) of this appeal from the grant of injunctive relief. Upon motion of the appellant-defendant, we granted a stay of the district court's decree pending this appeal and until further order of this court. *See* 12 EPD ¶ 11,252.

[14] Since they relate to back pay proceedings that have not yet begun, both of these rulings are interlocutory. But the district judge, after making the requisite findings, issued a certificate of appealability under 28 U.S.C. § 1292 (b), and this court gave the plaintiffs permission to appeal. Because this appeal has been allowed, the notices and questionnaires have not yet been mailed to class members.

Effect Of Dismissal Of Individual Claims On The Class Action

Urging that the dismissal of the personal claims of the named representatives of the class precluded consideration of the class complaint, Stevens asks that we vacate the district court's finding of class-wide discrimination without inquiring into the merits of that determination. Contrary to the defendant's vigorous arguments, however, a line of employment discrimination cases in this circuit holds that the failure of the personal claims of the class representative does not debar the previously certified Rule 23 (b)(2) class. *Barnett* v. *W.T. Grant Co.*, 518 F.2d 543, 548, n.5 (4 Cir. 1975); *Moss* v. *Lane Co., Inc.*, 471 F.2d 853, 855-6 (4 Cir. 1973); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1380 (4 Cir.), *cert. denied* 409 U.S. 982 (1972). While it is true that we have been less than explicit as to the reasons for this rule, justification for it has been ably summarized by other courts and commentators, *see, e.g., Jenkins* v. *United Gas Corp.*, 400 F.2d 28 (5 Cir. 1968); *Reed* v. *Arlington Hotel Co., Inc.*, 476 F.2d 721 (8 Cir.), *cert. denied*, 414 U.S. 854 (1973); Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 Duke L.J. 573; and the Supreme Court seems to have left no doubt but that this is the proper approach. *See East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 406, n.12 (1977); *Franks* v. *Bowman Transportation Co., Inc.* 424 U.S. 747, 752-7 (1976). Thus, regardless of whether or not the post-trial dismissal of the individual plaintiffs' claims was proper, the substance of the lower court's finding of class discrimination is before us on appeal.

Relative to this point, the individual plaintiffs contend that the district court erred not only in its dismissal of their personal claims but in refusing to extend to them the benefit of its finding that Stevens had discriminated

against the class of persons to which they belong. They argue that they, like the other class members, are entitled to participate in any back pay proceedings. Since this argument is dependent upon the correctness of the finding that the defendant was guilty of class-wide discrimination and since we must, in any event, review the judgment that Stevens violated the rights of the class, we turn first to this underlying issue.

Finding Of Class Discrimination

We will not review in detail the evidence, most of which was statistical in nature, upon which the court below relied in reaching the conclusion that the class was entitled to relief.[15] Rather, we will address the specific challenges made by the defendant to the soundness of the district court's decision.

As a general rule, four possible lines of defense are available to a party who disputes the substance of a determination that it has committed unlawful employment discrimination. These are (1) that the evidence upon which the court relied was an unreliable indicator of discrimination; (2) that the evidence, though credible, was insufficient to demonstrate discriminatory conduct; (3) that although discrimination was proved by competent evidence, the law does not forbid the proven act or omission; and (4) that the plaintiff's case was affirmatively rebutted in a manner which exonerates the defendant. Stevens' objections to the district court's finding of unlawful class-wide discrimination fall into these categories.

As a prefatory observation, we should note that the reliability of the statistical evidence upon which the district court based its decision is not impugned by the defendant's repeated caveats on appeal concerning the po-

[15] The evidentiary bases for the court's conclusion are set forth in detail in the findings of fact, 10 EPD ¶ 10,585.

tential which inheres in statistics in general for misleading the court or misstating the truth. Nor have we been convincingly apprised of any reason for believing that the figures upon which the district judge relied inaccurately reflected conditions as they existed in Stevens' operations in Roanoke Rapids.[16] From our reading of the record, the court had good reason to be satisfied with the foundations laid for the admission into evidence of the plaintiffs' statistical exhibits and to accept the unrebutted testimony of the only expert statisticians, both called by the plaintiffs, who testified as to the significance of this evidence. It is now well-established that statistical evidence is admissible to prove employment discrimination.

Despite the district court's factual determination that Negroes, as a class, occupied an inferior position with respect to the prospects of being hired and the chances of succeeding to desirable jobs and wages, the defendant argues that proof of these facts is nevertheless insufficient to support a finding that Stevens illegally discriminated on a class-wide basis as to race. Focusing upon the "because of" language of 42 U.S.C. § 2000e-2(a)[17] Stevens sug-

[16] We specifically note the propriety of the court's reliance upon applicant-flow ratios for the purpose of evaluating the historical operation of the hiring process, *see Hazelwood School District* v. *United States*, 433 U.S. 299, 308 n.13 (1977), as well as the deference we owe the court's choice of the species of data most appropriate to its inquiry. *Id.* at 312.

[17] 42 U.S.C. § 2000e—2(a) provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's race, color, religion, sex, or national origin.
>
> [Emphasis added.].

gests that it was incumbent upon the plaintiffs to demonstrate not only that they as a class were disfavored, but also that this was a result of practices which were racially discriminatory. It is urged that the statistics used to establish that the class was less favorably situated than whites are by their very nature inconclusive on this issue of causation.

This argument of the defendant elides the appropriate allocation of the burden of proof in a case such as this. With one exception addressed below, the plaintiffs, who from the beginning approached this as a case of "disparate impact" as opposed to one of "disparate treatment,"[18] were not required to prove that any particular employment decision or any specific employment practice on the part of Stevens was racially motivated. Instead, they were entitled to rest their *prima facie* case, under § 703 (a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)(2), upon a showing that the effect of facially neutral employment practices was to discriminate against them as a group. *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). We need not inquire whether this burden was satisfied solely by the statistical evidence of the significant disadvantages under which the plaintiff class laboured, since where, as here, such proof is coupled with evidence that the defendant based hiring and other employment decisions upon the subjective opinions of white supervisors, the trial court is entitled to infer, as it did here, that the defendant illegally discriminated, *cf. Brown* v. *Gaston*

[18] The two approaches are defined and contrasted in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977).

County Dyeing Machine Co., 457 F.2d 1377 (4 Cir. 1972), *Barnett* v. *W.T. Grant Co.*, 518 F.2d 534 (4 Cir. 1975), in which case the burden shifts to the defendant to prove that "he based his employment decision on a legitimate consideration, and not an illegitimate one such as race." *Furnco Construction Corp.* v. *Water*, U.S. , 46 U.S.L.W. 4966, 4969 (June 29, 1978).[19]

The one exception we discern to the application of the *prima facie* "disparate impact" principle in this case concerns the plaintiffs' complaint that their rights were violated by Stevens' use of a system of departmental seniority to determine the layoff and recall (but not promotion) rights of its employees.[20] Since an employee who transferred to another department was required to forfeit the seniority accumulated in his previous department, leaving him open to the possibility of layoff in his new job, we agree with the court below that black employees who were originally assigned in a discriminatory fashion to undesirable jobs were understandably reluctant to transfer, and were in effect "locked into" the less remunerative positions. But it was error to hold that the operation of this departmental seniority scheme violated either Title VII or § 1981. *International Brotherhood of Teamsters* v. *United*

[19] *Furnco* was a disparate treatment case controlled by *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). However, the shifting of the burden to the employer upon the establishment of a *prima facie* case by the plaintiffs applies equally in a case of disparate impact. This was recognized by Mr. Justice Marshall in his separate opinion in *Furnco* when he stated:

> "Once the plaintiff has established the disparate impact of the practice, the burden has 'a manifest relationship to the employment in question.' * * * There is nothing in today's opinion that is inconsistent with this approach or with our prior decisions." 46 U.S.L.W. at 4971.

[20] Under the system, those with the least departmental seniority in a job category, regardless of ability, were laid off first and recalled last.

States, 431 U.S. 324, 343-357 (1977), decided after the decision below, found in § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h),[21] a narrow exception to the broad coverage of that title, and held that a seniority system which applies evenly to all races, and which was negotiated and maintained free from any discriminatory purpose, does not itself violate Title VII, even though it perpetuates the effects of past discriminatory practices. Because the plaintiffs here concede that they do not challenge the bona fides of Stevens' seniority system, the conclusion that the departmental seniority system violated Title VII must be reversed. For the same reason, the conclusion that it violated § 1981 must also be set aside. *Johnson* v. *Ryder Truck Lines, Inc.*, 575 F.2d 471 (4 Cir. 1978).

Finally, we find no merit in Stevens' other defenses, which were rejected by the district court. We specifically note that, on the issue of discrimination, *Teamsters, supra*, 431 U.S. at 341-2, reaffirms the irrelevancy of the argument that the steady increase in the percentage of blacks in Stevens' total labor force during the period in controversy is a defense against the claims of earlier victims of post-Act discrimination. Accordingly, with the exception of the seniority system, the district court's conclusion that Stevens was guilty of discrimination against the plaintiff class is affirmed.

Dismissal Of Individual Claims

We turn now to the appeal of eight of the named plaintiffs—Herman Jones, Luke Phipps, Clara Purnell, Patricia

[21] 42 U.S.C. § 2000e-2(h) provides in part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority * * * system, * * * provided that such differences are not the result of an intention to discriminate because of race * * *.

Purnell, Marie Robinson, Mable Moody Miles, Thomas Hawkins, and Lucy Sledge—who, relying in part upon the finding of classwide discrimination which we have discussed, take issue with the dismissal of their personal claims.[22] Although we review the dismissals on an individual basis certain considerations common to them guide us in doing so.

First, the dismissals are placed in proper context by acknowledging that their sole consequence is to bar these appellants from receiving back pay with respect to the grounds upon which their claims were dismissed.[23] The judgment of dismissal did not strip any of them of class membership, and to the extent that they would personally benefit, directly or indirectly, from any of the other remedies ordered by the district court they have not been denied such benefits. Those of the named plaintiffs who are presently employed by the defendant, for example, are not by reason of the dismissal deprived of the constructive seniority which they and other black employees will receive.[24]

Second, in reviewing the reasons given by the court for barring these particular claims for back pay we are mindful that the timing of the dismissals alters somewhat the criteria by which we would usually determine on appeal whether a claimant has established a sufficient case for personal relief. Ordinarily, once it is shown at the first, or "liability" stage of a bifurcated class action, as it was here, that an employer has engaged in a pattern of illegal discrimination against Negroes by disproportionately denying them employment and assigning those who are hired to lower-paying jobs than whites, it is then presumed that individual hiring or job assignment decisions were infected by the discrimination and that victims of those decisions

[22] The other named plaintiffs have not appealed.

[23] *See* n.5, *supra.*

[24] *See* pp. 47-48, *infra.*

are entitled to make-whole awards. All an individual plaintiff must then establish at the second or "back pay" stage of trial is (a) his identity as one of the presumed discriminatees—that he is black and that during the period in controversy he applied for employment and was not hired, or upon being hired was assigned to one of the low-paying jobs, and (b) any information requested of him to assist the court in determining the amount of the economic loss he suffered as a result. The burden then shifts to the employer to demonstrate by a preponderance of the evidence, if it can, that factors other than the condemned discrimination caused the decision of which the particular back pay claimant complains, e.g., that with respect to the unsuccessful applicant there were no job openings or at least none for which he was qualified, or that with respect to the employee assigned to undesirable work no better jobs were vacant or at least none for which he was qualified. If this burden is met compensation may be denied unless the claimant can show that the exculpatory reason advanced by the employer is mere pretense—that, for example, white persons with qualifications identical to those of the claimant or who also did not meet the prescribed qualifications were nonetheless assigned to the position sought. *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 357-362 (1977); *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 770-773 (1976); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 413-422, 425 (1975); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 804 (1973); *United Transp. U. Loc. No. 974* v. *Norfolk & Western Ry. Co.,* 532 F.2d 336, 341 (4 Cir. 1975), *cert. denied* 425 U.S. 934 (1976).

This process for proving an entitlement to monetary restitution was cut short in this case because the decision to bar the claims of the named plaintiffs was reached after trial on the issue of the legality of Stevens' conduct, but prior to the second stage of the bifurcated proceedings which had been expressly reserved for the evaluation of

requests for individual relief. While this timing was not error *per se*,[25] it does restrict the circumstances under which a dismissal would have been justified. Certainly if the illegality of a particular employment practice was not established in the first stage of the inquiry then, because back pay is available only to victims of conduct found to be illegal, the trial court could properly have dismissed, prior to the proceedings for individual relief, any requests for compensation based upon the unimpeached practice. But it would have been unfair to penalize any claimant—whether a named plaintiff or not—for failing to affirmatively prove in the first step of the inquiry that which he was led to believe he would be expected to prove only in the later, yet-to-be-held back pay proceeding. Thus, once the illegality of certain employment practices was established, a dismissal mid-way through the bifurcated process would have been appropriate only if it was conclusively demonstrated by evidence already adduced at the "liability" stage that either a particular claimant would be *unable* to subsequently substantiate his membership in the class of victims of that conduct, or that *regardless* of the showing a particular claimant might make, Stevens had an acceptable and unassailable reason for its action toward him.

[25] The relegation of requests for individual relief to a discrete stage of the trial is a management device, the purpose of which is to make the litigation of class actions less cumbersome. *See* Manual for Complex Litigation, § 4.12, and the Notes of the Advisory Committee on Rules to the 1966 Amendments to Fed. R. Civ. P. 23. Even where, as here, there is no doubt but that some class members will be permitted to assert entitlements to monetary awards, it would be inconsistent with the goal of streamlining the proceedings to require the court to close its eyes at an earlier stage of the trial to proof that a particular class member will not succeed in any subsequent quest for back pay. As we have pointed out, the essential error of the district court in the cases of the individual claimants was the dismissal of their claims without taking into account the presumption in their favor resulting from its ruling that class discrimination existed.

Finally, we know of no good reason why this procedure for litigating entitlement to back pay, with its presumptions and shifting burdens of proof, should have been altered by the fact that each of the appellant-plaintiffs appeared as a witness during the trial's initial phase. The district judge, however, apparently felt that by reason of their election to testify these class members subjected themselves to a more rigorous burden of proof. Although not the sole basis for the dismissals, the court expressed with respect to one of the appellants a view which surfaces in its stated reasons for denying all the claims:

> The court is of the opinion that when an employee joins in an action of this kind following charges of the serious nature made by this plaintiff and then comes to court and testifies, he should give some testimony, either personally or through others, tending to substantiate the charges * * *

Jt. App. 282. The record shows that the named plaintiffs testified incident to the admission into evidence of their respective employment records, and that the brief testimony given by each of them was directed to only the most rudimentary aspects of the personal grievances for which they apparently intended to seek compensation in the anticipated back pay inquiry.[26] Beyond its possible value for illustrative purposes, it appears that this testimony added little to the statistical evidence of the discriminatory impact of Stevens' employment practices and that it could properly have been disallowed by the trial court as being both cumulative on the question of discrimination and premature with respect to the back pay determinations. But there is nothing inherent in the choice of the parties to

[26] Typical was Herman Jones who, in addition to verifying the accuracy of the defendant's written record of his employment history and the authenticity of exhibits relating to his dealings with the EEOC, briefly testified as to his race, date of hire, and initial assignment of the job of Janitor. Tr. 139-141.

testify that would justify imposing upon them burdens in addition to those we have already mentioned and, except to the extent that admissions made during the testimony of a particular claimant could conceivably demonstrate that he should receive no award or his inability to subsequently substantiate his membership in the class of presumed discriminatees, the dismissals can draw no support from the decisions of these appellants to appear as witnesses. *See Preisseisen* v. *Swarthmore College*, 442 F.Supp. 593, 600-601 (E.D. Pa. 1977). With these considerations in mind, we examine the propriety of each of the dismissals.

Herman Jones

As the district court recognized, the evidence indicated that Herman Jones, a black man, was hired as a janitor in 1962, worked as a "sweeper and cleaner" for part of 1966, and was transferred to the position of "warehouseman" in July, 1966. He held the latter job until he voluntarily left Stevens' employ in August, 1970. It was apparently his intention to seek a back pay award on the basis that, absent discrimination, he would have held a better-paying job than that of "warehouseman" during that part of his tenure with Stevens that falls within the limitations period applicable to this action.

Despite the court's conclusion that Stevens illegally discriminated in its job assignment, promotion and transfer policies, as well as in its reservation of the low-paying job of "warehouseman" for blacks, Jones was forbidden from pursuing a back pay recovery on the ground that there was no evidence from which it could be found that he "was qualified for any job higher than that of warehouseman at the time of his departure." As our prefatory comments indicate, this was error. Aside from the fact that questions of a claimant's qualifications are properly left to the "back pay" stage of trial, Jones, who had already established his

assignment to the job of "warehouseman," was entitled to the presumption that he had been discriminatorily denied a better position. On remand Jones' candidacy for back pay must be restored. It will be the defendant's burden to prove, if it can, both the existence of qualifications for better-paying jobs and Jones' failure to meet them. *See United Trans. U. Loc. No. 974* v. *Norfolk & Western Ry. Co.*, 532 F.2d 336 (4 Cir. 1975), *cert. denied* 425 U.S. 934 (1976).

Luke Phipps

For the same reason, the dismissal of the action as it relates to Luke Phipps, for failure to prove "by a preponderance of the evidence that [he] was the victim of racial discrimination," must be reversed. He too sought compensation for discriminatory assignment to the low-paying job of "warehouseman"; his employment history, admitted into evidence on the issue of liability, showed, as he would be expected to demonstrate at the second step of the bifurcated trial, that he was assigned to and remained in that position from the time he was first employed in April, 1969, until his termination on June 26, 1971. Like Jones, Phipps was entitled to carry with him into the back pay proceeding the yet unrebutted presumption that he was the victim of discriminatory job assignment and promotion practices; and to the extent that a reference in the findings of fact to his failure to file a charge with the EEOC can be read as another reason for barring him from seeking back pay, that ground is equally without merit, especially in light of the plaintiffs' alternative reliance upon 42 U.S.C. § 1981, which carries no exhaustion requirement. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 256 (5 Cir. 1974); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 801-2 (4 Cir. 1971), *cert. dismissed* 404 U.S. 1006 (1971) and 404 U.S. 1007 (1972).

Clara Purnell

The brief testimony of Clara Purnell, a black woman, reveals that she claims to have been refused employment on account of her race. The district court noted without comment that in her charge filed with the EEOC, which was admitted solely to establish Title VII jurisdiction, Purnell claimed to have unsuccessfully applied for a job with Stevens more than once between 1960 and 1969, and that a July 26, 1972, employment application, identified as hers, had been admitted into evidence on the issue of liability. In spite of its finding that Stevens engaged in class-wide hiring discrimination, the court described itself as "unable to find [her] allegations of discrimination to be substantiated" and blocked her participation in the proceedings for monetary relief. We reverse since, until the contrary is shown, the refusal to hire any black applicant within the period in controversy must be assumed to be a manifestation of the larger pattern of hiring discrimination of which Stevens was found guilty. On remand Purnell will be allowed to establish her identity as one of the class of discriminatees, if she can, by giving proof of her unsuccessful applications, and it will be up to Stevens to substantiate reasons in mitigation of liability for each rejection that is shown.

Patricia Purnell

The complaint alleged that Patricia Purnell was denied employment because of her race. Two employment applications, bearing her name and dated October 23, 1969, and June 13, 1972, were admitted into evidence below, as was proof that she was never hired; undoubtedly she will meet the initial burden of proof in the proceedings for personal relief. Resting as it does upon the incorrect notion that Purnell was required to establish and failed to prove in the initial phase of this action the discriminatory acts of which

she personally complains, the judgment of dismissal as it relates to her is vacated and remanded.[27]

Marie Robinson

A Stevens employee, Marie Robinson complained that she had been discriminatorily denied promotion. Citing the absence of any evidence that Robinson "was qualified for some position other than the one she has been filling, that a vacancy existed and that some white person got the job," the district court refused to recognize her eligibility for back pay. But while evidence of vacancies, qualifications, and the employer's selection of a person of another race may be vital elements of the *prima facie* case which a non-class plaintiff must prove in a private action under Title VII, *see McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), the components of a *prima facie* case in a class action prosecuted under the "disparate impact" approach are different. As we have already concluded, the class plaintiffs here successfully established a *prima facie* case of classwide discrimination in promotions with evidence of the defendant's reliance upon the subjective opinions of white supervisors in making promotions, proof of the defendant's failure to either promulgate objective job criteria or to post notices of vacancies, and statistical evidence of the manner in which this system worked to the disadvantage of black employees. The district court failed to find that Stevens had overcome that showing. Marie Robinson will thus be entitled on remand to attempt to bring herself within the class of persons presumedly disadvantaged by Stevens' promotion policies, and if she succeeds it will be her *employer's* responsibility to prove the

[27] The complaint also relates that both Purnells originally maintained that they were denied jobs because of their civil rights activities. But no evidence bearing on the issue of vindictiveness was offered at the liability stage of trial, and it is conceded on appeal that these allegations have been abandoned. This admission will, of course, bind these plaintiffs on remand.

absence of vacancies in better jobs, her lack of qualification, or some other valid reason for its failure to promote her. *See Hairston* v. *McLean Trucking Co.*, 520 F.2d 226 (4 Cir. 1975); *White* v. *Carolina Paperboard Corp.*, 564 F.2d 1073 (4 Cir. 1977).

Mable Moody Miles

Mable Moody Miles, hired by Stevens in 1967, alleged that she was initially assigned to a lower-paying or less desirable job than her white counterparts and that she was denied promotions because of her race, but her allegations were found to have been unsubstantiated at the trial on the issue of liability.[28] Miles testified that she had received several promotions from her original job as "winder tender," and that her job at the time of trial, that of "warper tender," was one of the highest paid in the department in which she worked.

Like the previous claimants Miles must be afforded an opportunity to pursue back pay. Although the record suggests that the defendant may be possessed of a valid defense to her claim, the mere number of promotions she received does not exclude the possibility that, absent the class-wide discrimination in promotions which Stevens practiced, she would have received promotions leading to a better job in her own department or in a department with a better wage scale during the period in controversy. Nor can it obscure the fact that the finding of class-wide discrimination in job assignments suggests that her initial assignment, which continued into the period of limitations, may have been to a less lucrative job than she would have received had she been white.

[28] Another of her grievances—that, because of race, she was not assigned to the first shift—was also found to lack support. But the dismissal of this charge is expressly not questioned on appeal.

Thomas Hawkins

Thomas Hawkins' application for employment with Stevens was introduced into evidence, as a copy of the charge he filed with the EEOC in which he alleged that Stevens "refused to hire [him] while at the same time they hired whites." The application is dated July 21, 1969, and on the EEOC charge both Hawkins' signature and that of a witness bear the date of July 26, 1969. Troubled by the fact that Hawkins listed on his application one of the plaintiffs' present attorneys as a character reference, by the short five-day interval between his application for work and the dates on the EEOC charge, and by its own impression that the man who witnessed the charge was "active on his own behalf and in assisting others in preparing charges of racial discrimination * * * against eastern North Carolina industries and in conducting employment litigation against them," the district court dismissed the action as to Hawkins, concluding that instead of seriously seeking employment he had applied for work only to enable him to join in this suit. As an alternative ground for its action, the court cited the absence of any evidence that Stevens' failure to hire Hawkins was "racially motivated."

We have already rejected the view that the plaintiffs, either as a class or as individual claimants, were required to prove that hiring decisions were tainted by racial animus. As to the other point upon which the dismissal was based, in *Lea* v. *Cone Mills Corp.*, 438 F.2d 86 (4 Cir. 1971) (per curiam), we approved of the disallowance of back pay to unhired plaintiffs whose primary purpose in applying for work with a defendant was to test the legality of the employer's hiring practices rather than to seek actual employment. Such "test" plaintiffs are not, of course, harmed by a refusal to hire since they are not seriously interested in the job for which they apply. Hawkins maintains, however, that the conclusion that he was not a *bona fide* applicant is speculative because the record does not support it and because, in any event, he was neither advised at

trial that his *bona fides* were in issue nor given an opportunity to disprove by direct testimony the inference drawn by the court. He asks for a chance to respond to the matter in an evidentiary hearing upon remand.

The record supports this argument that the issue of Hawkins' sincerity was never joined at trial. Neither the pleadings nor anything which transpired during the course of the proceedings can reasonably be interpreted as notice that the defendant would raise the *Lea* defense or that the court would *sua sponte* enter that area. Hawkins was asked no questions by the trial judge or opposing counsel during his brief appearance as a witness, and the first reference of any kind to this defense was when the court issued the findings summarized above. Although we agree that the factors which troubled the district judge do suggest the possibility that Hawkins was a "tester," the consequences of attributing such status to a back pay claimant require that, as in the *Lea* case, his motives be considered only upon an adversarial presentation of the evidence. Accordingly, we reverse his dismissal and remand the claim for further proceedings in the district court.

Lucy Sledge

The complaint states that Lucy Sledge was employed by the defendant until July, 1968, at which time she was laid off. It charges not only that she was originally and discriminatorily assigned to a lower-paying job, but also that Stevens has refused to recall or rehire her since the layoff because of her race. Canvassing a copy of her employment history and her EEOC charge, as well as her testimony at trial, the district court found no indication of either the dates of five reapplications for work she claimed to have made prior to 1970 while on furlough or of any corresponding vacancies in jobs with the defendant. Sledge was dismissed from the relief aspect of the proceedings because "defendant was hiring blacks in substantial numbers during the period in question, and the court cannot

assume that this plaintiff was singled out for rejection simply because she was black."

Sledge would have us reinstate her individual claim on the ground that she is presumptively the victim of proven discrimination with respect to her recall rights. Additionally, she argues that because she also claims to have applied for and been denied a job following the layoff, she, like other unsuccessful black applicants for jobs, may pursue a claim based upon hiring discrimination. Both contentions must be addressed since if Sledge is permitted to seek back pay the size of the award for which Stevens may be found liable would be governed by the precise nature of her grievance.

We agree with the trial judge that Sledge should not be allowed to press for relief on the theory that she was the victim of a discriminatory administration of recall rights. Stevens was found to have chosen which of its laid off employees to restore to active duty solely "on the basis of departmental seniority"; there was no finding that the defendant engaged in a pattern or practice of altering this order of recall on account of the race of the idled workers. Absent such a conclusion, which would have supported the inference that the unexplained failure to recall any black worker was due to that person's race, there is no reason to suspect that plaintiff Sledge was denied reinstatement on the basis of her race unless the evidence can be said to show that in spite of its apprently neutral treatment of the class of laid off black employees in general, Stevens failed to recall this *particular* plaintiff from lay off status because she is black.

Sledge urges that discrimination against her in particular was sufficiently demonstrated by evidence that her layoff continued while a number of identified women, some of them white, were hired from the pool of non-employee applicants to fill various jobs with the defendant. This, she says, conflicts with the testimony of Stevens' assistant

personnel director who stated that as a matter of policy the defendant gave first priority in filling new vacancies to laid off employees whose own jobs remained idle and who were not required to re-apply for employment in order to be eligible for such jobs. Pointing to the finding that there are few, if any, special qualifications for the jobs which these others, including white women, were given and her record as a good employee, Sledge contends that it must be assumed that the reason for the failure to reactivate her by assignment to one of those positions is that she is black.

The flaw in this argument is that there was no evidence to show that Sledge was so situated on the seniority roster of laid off employees as to be eligible for recall. Because an employee's recall to the position from which she was laid off would not have occurred under the Stevens system until all other furloughed workers with more departmental seniority in the relevant job category had first been reactivated, and since the trial testimony revealed that a laid off employee would assume a vacancy outside his own department only if his company seniority was greater than that of other laid off workers vying for the job, it would not be a fair inference that a plaintiff such as Sledge had been wrongfully discriminated against unless it is also shown that the employer's failure to recall her was not due instead to the fact that her recall or reemployment rights simply had not yet matured. Upon the record it is reasonable to infer that Sledge's recall was delayed by the fact that persons with more seniority had not yet returned to work in which case the failure to offer her a job under the circumstances of this case would not amount to racial discrimination. This is not to say that an individual plaintiff who asserts that he or she was the victim of a discrimination not suffered by the class in general must exclude every hypothetical reason for the defendant's action toward him, but he must show that the employer's failure to recall him did not result from what is certainly one of the

"most common legitimate reasons on which an employer might rely." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977). *Cf. McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973).

On the other hand, we can perceive in the record as it presently exists no difference between Sledge's claim of hiring discrimination, based on her alleged reapplications for work, and the claims of discrimination in hiring advanced by the other plaintiffs. Apart from its apparent practice of automatically recalling laid off employees on the basis of seniority, Stevens admittedly accepted applications for work from such persons just as it did from total strangers. The district court's conclusion that the defendant practiced wholesale discrimination in hiring was not qualified to exclude from its scope laid off employees who resubmitted applications, and on remand Sledge should be allowed to proceed in the same fashion as Clara Purnell with respect to this aspect of her claim. Of course, she must present credible evidence of the various applications she claims to have made, and among the possible defenses available to Stevens will be proof, if it exists, that it has pursued a non-discriminatory policy which was legitimately applied to Lucy Sledge of subjecting the reapplications of laid off employees to the same seniority standards that govern recalls without application.

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In holding that it was error to preclude any of these named plaintiffs from participating in the proceedings for back pay we, of course, express no opinion as to whether or not they will eventually be entitled to monetary relief. The back pay proceedings had not yet been initiated at the time this appeal was taken, and it is impossible at this juncture to ascertain whether the appellants will succeed in bringing themselves within the class of entitled discriminatees or whether the defendant has a legitimate defense to any such claims. Additionally, the district court

should not consider itself restricted in any fashion in the formulation of standards for computing and distributing the back pay which may be due members of the class.

The Remedial Decree

The defendant contests in a general fashion the various measures prescribed by the district court for the equalization of employment opportunities between the races at Stevens' Roanoke Rapids operations. With those objections in mind we have examined the remedial decree and, with the exception of those provisions hereinafter specifically discussed, conclude that it does not constitute an abuse of the broad discretion with which the federal district courts are vested for the purpose of restoring black persons to full citizenship in the workplace.

It may be true, as Stevens maintains, that the decree in question imposes upon the employer an array of affirmative obligations which is unprecedented in its dimensions, the degree to which it limits the defendant's free hand in personnel matters, and the difficulty that may arguably be experienced in complying with its provisions. But to suggest that this alone is reason to modify the injunction is to disregard the highly individualistic nature of the relief which the courts are required to provide once the disparate racial impact of an employer's practices has been demonstrated. The court below was duty-bound to "render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future," *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975), and nothing less than "the most complete relief possible" under the circumstances would fulfill that obligation. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 764 (1976). Given that the defendant employed several thousand persons in hundreds of job categories in scores of departments, and that the various discriminatory practices for which it was called to task were found to have disadvantaged black employees and potential employees

in a number of different ways, the complexity of the injunction is for the most part both understandable and necessary. To the extent that the intricacies of the decree may prove to provoke confusion or practical difficulties in its implementation, the proper course will be to petition the court for clarification or amendment of the decree pursuant to the procedure therein established for that purpose.

The other, and most persistent, objection raised by the appellant to certain features of the decree is that they amount to "pro-black and anti-white" "racial directives" which will result in the "demoralization" of both black and white employees and work a reversal of the aims of equal employment opportunity legislation. It suffices to say that two of the challenged provisions—the "red circling" of wages and seniority relief—have consistently been upheld in the face of such criticism in the past, and are now acceptable tools for the eradication of the practices condemned by Title VII. *See Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); *Swint* v. *Pullman-Standard*, 539 F.2d 77, 100-101 (5 Cir. 1976). *Cf. Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 796, 799 (4 Cir. 1971) *cert. dismissed*, 404 U.S. 1006 (1971) and 404 U.S. 1007(1972). The appellant has not persuaded us that either of these remedies is unworkable, unnecessary, or likely to produce unusually harsh results in the circumstances of this case and, accordingly, we agree with the decision of the district judge to employ them. We are of the opinion, however, that seniority relief should be granted, not to all black employees as the decree presently provides, but only to those who suffered illegal discrimination, with seniority consequences, during the appropriate period of limitations. *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977).

Stevens' objections to the imposition of hiring and promotional quotas, however, present a more serious question for our consideration.

Hiring quotas

The decree requires that the defendant hire new employees in accordance with numerical formulae. We refer to these formulae as "quotas" for want of a better term to describe the specific percentages of total job placements which Stevens was ordered to fill with black and with white persons, respectively.[29]

A blanket hiring quota is contained in Paragraph 5 of the decree under the subtitle of "Hiring Provisions":

> 5. For all applications for jobs other than those clerical jobs specified in paragraph 10, beginning with the calendar quarter next beginning after entry of this Decree, in each calendar quarter, the defendant shall make bona fide offers of employment to the same ratio of black male applicants as of white male applicants, and it shall make bona fide offers of employment to the same ratio of black female applicants as of white female applicants. If, for example, the defendant makes such offers to sixty per cent of the white male applicants and forty-five per cent of the white female applicants in a calendar quarter, it shall make such offers to not less than sixty per cent of the black male

[29] "Quotas are mandatory percentages of minority employment representation." 30 Congressional Quarterly 3092 (Dec. 2, 1972). Whether the provisions of the decree might be more accurately termed "goals," "targets," "minority preferences," etc., has little bearing on the issues in this case. As Mr. Justice Powell observed:

> "This semantic distinction is beside the point: the special admissions program is undeniably a classification based on race and ethnic background. * * * Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status." *Regents of the University of California* v. *Allan Bakke*, U.S. , 46 U.S.L.W. 4896, 4901 (June 28, 1978).

> applicants and not less than forty-five per cent of the black female applicants in that calendar quarter.[30]

Clerical vacancies are excepted from the operation of Paragraph 5 and are addressed separately in Paragraphs 10 and 11:

> 10. Vacancies in the following jobs shall be filled, subject to availability, on an alternating basis, with at least one black placed for each white so placed in the plant or office in question, until forty percent of the employees in those jobs in that particular plant or office are black. This percentage figure is taken from plaintiffs' Exhibit 63, which shows that blacks constituted 41.9% of the clerically-qualified applicants for employment referrals at the Roanoke Rapids office of the North Carolina Employment Security Commission. The jobs are:
>
> (a) Clerical jobs in the Central Office;
> (b) Clerical jobs in the Customer Service Office;
> (c) Clerical jobs in the Information Services Center;

[30] Strictly construed, this paragraph requires only that Stevens "make bona fide offers of employment" to the appropriate percentage of black applicants, as opposed to the requirement that Stevens actually employ them. As a practical matter, however, this is a hiring quota since, because the offer of employment must be bona fide, the defendant must hire the offeree unless the applicant rejects the offer. And although in another part of the decree the court disclaimed any intention to require Stevens to hire a person who is found by objective standards to be "unfit to work", this proviso apparently would not excuse a failure to hire in accordance with the "applicant flow ratio" of Paragraph 5. Aside from the fact that an offer to an "unfit" person would likely not be considered bona fide, one of the court's findings of fact was that "most of the job categories in these plants can be filled by any willing, able-bodied person." Moreover, the defendant was ordered to "provide such reasonable training to as many blacks as may be necessary to insure compliance" with this part of the decree.

(d) Clerical jobs in the defendant's other [Roanoke Rapids] facilities . . .

11. All facilities which are mentioned in paragraphs 10(a) through 10(d), after meeting the requirements of paragraph 10, shall thereafter for a period of two years together make bona fide offers of employment to the same ratio of black applicants for the jobs mentioned in paragraph 10 as of white applicants for such jobs.[31]

Separate provision is also made for the selection of persons to fill weaving jobs. Paragraph 15 of the decree reads:

15. Vacancies in weaving jobs shall be filled, subject to availability, on an alternating basis in each plant, with at least one black placed for each white so placed, until forty percent of the total weaving jobs held by males are held by blacks. This percentage figure is taken from Finding 46 in the court's decision, which found that when the defendant ended its discrimination against black women in making initial assignments of women to weaving jobs, 39.4% of the women so placed were black.[32]

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[31] Neither Paragraph 10 nor Paragraph 11 requires that clerical vacancies be filled with "new hires," although in the light of evidence adduced at trial and the court's acknowledgment that clerical employees need prior training to do the work, it is most likely that this will be the case with regard to a substantial portion of such openings. To the extent that the defendant is apparently free to promote to these jobs persons who are already in its employ, the quota is a "promotional quota" rather than a "hiring quota," and is addressed in the next subsection of this opinion.

[32] The court found that "[p]revious experience is not required in order to be assigned to this job, and the defendant frequently hired inexperienced persons off the street for weaving jobs." But as in the case of clerical vacancies, Paragraph 15 does not exclude the possibility that weaving vacancies will also be filled by promotions. *Cf.* n.31, *supra.*

Stevens raises two objections to these provisions of the decree. It contests the propriety of any quota relief whatsoever and, in any event, questions the validity of the statistical requirements upon which the quotas are based, notably the "applicant flow" approach of Paragraph 5. We reach only the first objection since we conclude that for the reasons hereinafter set forth the imposition of hiring quotas was inappropriate in this case.

The question of whether the imposition of hiring quotas is an appropriate judicial response to a finding that an employer has been guilty of racial discrimination in its employment decisions has not been squarely addressed by us, nor has the Supreme Court provided definitive guidance in this area. Our reading of the several opinions in the recent case of *Regents of the University of California* v. *Allan Bakke* U.S. , 46 U.S.L.W. 4896 (June 28, 1978), indicates that the imposition of hiring quotas in Title VII cases is still an open question, although Mr. Justice Powell noted that "[t]he courts of appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference." *Id.* at 4905.

The closest our circuit has come to facing the issue was in the case of *Harper* v. *Kloster,* 486 F.2d 1134 (4 Cir. 1973). There the plaintiffs asked us to hold that in addition to the other relief from employment discrimination granted by the district court, racial hiring quotas should have been fixed for certain categories of fire department employees. Recognizing the uncertain constitutional status of quotas, and noting the rigid scrutiny to which racial classifications are subjected, the district court, without addressing the underlying issue of the permissibility *vel non* of imposing any type of quota, had rejected the same request on the ground that the plaintiffs had shown no "sufficiently compelling need" for a race-based quota. "Because effective

relief can be granted without resort to this device, the Court will avoid it." *Harper* v. *Mayor and City Council of Baltimore*, 359 F.Supp. 1187, 1213-1215 (D. Md. 1973). Our opinion expressed agreement with both the district judge's discussion and his conclusion, citing without further comment the portion of his opinion on the subject. 486 F.2d at 1136.

The other "quota" case in this circuit is *Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4 Cir. 1976), *cert. denied*, 429 U.S. 920 (1976), which was likewise decided without the need to authoritatively determine whether quotas may validly be imposed in employment discrimination actions. There we considered a district court order designed to remedy race and sex discrimination in the appointment of supervisory employees which required that vacancies in such positions be filled with qualified blacks and women (except when none could be found) until the percentage of blacks and women in these jobs equalled the percentage of blacks and women in the area work force.[33] Although there is dictum in *Patterson* to the effect that Title VII does not forbid this type of preferential relief, 535 F.2d at 274, the quota provision of the decree in that case was disapproved on the basis that "the rate at which the company currently appoints blacks and women to supervisory positions is sufficient to show that there is no compelling need for the imposition of a quota." 535 F.2d at 275 (footnote omitted).[34] In the light of *Harper* and *Patterson* it can fairly be said that, assuming quotas are permissible elements of remedial decrees in employment discrimination cases, they are appropriate only under lim-

[33] Like two of the challenged quotas in the instant case, *see* nn.31 and 32, *supra*, the *Patterson* quota apparently applied to both new hiring and promotions.

[34]. A post-*Patterson* opinion of this court similarly interprets that case as not having decided the abstract validity of racial quotas. *See White* v. *Carolina Paperboard Corp.*, 564 F.2d 1073, 1091 (4 Cir. 1977).

ited and "compelling" circumstances. Where, as in *Harper*, effective relief can otherwise be afforded, or where, as in *Patterson*, an employer, subsequent to the effective date of Title VII, has made convincing and satisfactory progress toward the goal of equal hiring opportunity for persons of all races, it will ordinarily be unnecessary for the court to consider the prescription of quotas. Such a course avoids the troublesome questions of possible statutory and constitutional conflict inherent in the use of quotas,[35] and the district court may, of course, retain jurisdiction to monitor the future progress of the employer.

A similarly cautious approach to the imposition of curative quotas or "goals" has been followed by even those courts which seem to have expressly endorsed the use of race-based hiring ratios. *Harper*, for example, is in accord with the view of other courts which have expressly endorsed or rejected the use of hiring ratios depending in part upon whether other, less color-conscious relief, was considered capable of redressing an employer's prior discrimination. *See, e.g., United States* v. *City of Chicago*, 549 F.2d 415, 437 (7 Cir. 1977), *cert. denied*, 434 U.S. 875 (1978); *Morrow* v. *Crisler*, 491 F.2d 1053 (5 Cir. 1974), *cert. denied*, 419 U.S. 895 (1974); *Vulcan Soc. of N.Y. City Fire Dept., Inc.* v. *Civil Service Com'n.*, 490 F.2d 387, 398 (2 Cir. 1973). Other cases voice *Patterson's* concern for the effectiveness of an employer's own efforts to correct past inequities. *See, e.g. United States* v. *City of Chicago, supra; Rios* v. *Enterprise Association Steamfitters Local 638*, 501 F.2d 622, 631-632 (2 Cir. 1974). And those who have considered more often than we the situations in which such preferential relief may be proper have identified a third factor—whether the discrimination to be remedied has

[35] *See, e.g.*, the majority and dissenting opinions in *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622 (2 Cir. 1974), which address from opposing viewpoints the issue of a quota's compatability with the Due Process and Equal Protection Clauses of the Constitution and with Title VII itself.

been egregious, purposive or blatant. *See, e.g., Kirkland* v. *N.Y. St. Dept. of Correctional Services*, 520 F.2d 420, 427 (2 Cir. 1975), *cert. denied*, 429 U.S. 823 (1976); *NAACP* v. *Allen*, 493 F.2d 614 (5 Cir. 1974).

Neither these nor any other considerations which might appropriately enter into a decision to order a hiring quota were addresssd by the court below.[36] Because we think that the record on appeal itself refutes any contention that the requisite "compelling circumstances" were present to justify this aspect of the decree, we find the hiring ratios to be inappropriate on the facts of this case.

Significantly, in the present case the court specifically found that Stevens had not "consciously engaged in discriminatory employment practices" or deliberately chosen to violate either Title VII or § 1981 by its hiring practices. "Except as to such facially neutral practices as its seniority rules, word-of-mouth hiring, etc., there is in fact no readily apparent means the defendant could have adopted, consistent with good business practice, to avoid these consequences." Jt. App. 330, 338-339. Although this is no defense to the unfair labor practices Stevens was found to have committed, and is not dispositive of the quota question, we think that this finding, together with the absence of any evidence of overt discrimination, rebuts the appellants' argument that the discrimination was "egregious" or flagrant, and is an answer to the charge that this case involves the kind of "exaggerated facts" which Judge Widener's separate opinion in *Patterson*, 535 F.2d 276, suggests would raise the issue of the need for a quota. At this juncture there is no reason to assume that the defendant

[36] The sole explanation offered by the court for including the hiring quotas in the remedial decree was that since in *Patterson* this court "placed its imprimatur on the establishment of quotas" in Title VII cases, "it must be regarded as settled law in this jurisdiction." As we have already indicated, this reading of *Patterson* is too broad.

will not comply with alternative injunctive directions designed to remedy the discrimination at Roanoke Rapids.

Moreover, the evidence shows that during the pendency of this litigation substantial progress was made in removing the disparities between the hiring of blacks and the hiring of whites by the defendant. The district judge found that the number of black persons hired between 1967 and 1972 had significantly increased:

> 93. From 1967 to 1972 the number of black employees at Stevens grew from 533 to 1,271 while the number of white employees dropped from 2,809 to 2,499. During this period the percentage of blacks in the total labor force rose from 15.9% to 33.7% while the percentage of whites dropped from 84.1% to 66.3%. This is attributable, at least in part, to the fact that more whites are now seeking employment in occupations with higher pay scales than the textile mills. But there is still a much larger number of applicants, black and white, than there are jobs to be filled.
>
> 94. In defendant's Roanoke Fabricating Plant the number of black employees increased from 28.9% to 50.2% of the total between 1967 and 1972.

Evidence taken in the interim between trial and the entry of the decree also indicates that during the years 1972-1975 50% of the 5,000 new hires were black which was in excess of the proportion of blacks in the local labor force. The plaintiffs themselves concede that at the end of 1975 blacks constituted at least 37.1% of Stevens' employees compared to only 19.4% in 1970. The marked improvement in black employment is readily apparent in light of the fact that in 1974, blacks made up only 40.6% of the area's entire civilian labor force. As we have heretofore noted, these figures do not exonerate the defendant from liability for discrimination. Nonetheless, this evidence was signifi-

cant to demonstrate that the defendant, prior to the entry of the decree, was not intractable on the issue of increasing the number of minority persons hired, and had made commendable progress in removing the inequities of the past.

In the light of these observations, we believe that whether or not quotas are permissible remedies, effective relief from hiring discrimination can be granted in this case without resort to them. Those specific aspects of the hiring process which were found to have accounted for the disproportionate rejection of black applicants—the policy of relying upon the subjective conclusions of white officials, the failure to establish objective hiring guidelines, and the failure to post vacancies—are directly and sufficiently addressed by other provisions of the decree.

The decree directs the defendant to promulgate and employ objective, racially fair, job-related standards for the purpose of determining whether or not an applicant is fit to work. These are to be filed with the court and are subject to the objections of the plaintiffs and the Union; a Special Master is directed to hear and resolve such objections. Notices of all vacancies to be filled with new employees are also to be posted at every place at which employment applications are taken, and are to include the training rate of pay, the usual length of training, and the full rate of pay for each job, as well as a sufficiently detailed description of the nature of the position to be filled. *See* Paragraph 23. These descriptions are also to be filed with the court and may be scrutinized by the plaintiffs and the Union. In response to the fact that some applicants for clerical jobs had apparently in the past mistakenly completed an application for production plant employment and therefore had not been considered for clerical jobs, Stevens is required to use a separate application form for clerical positions and to apprise all job applicants of this fact via posted notice.

Additionally, the decree requires the defendant to invite previous black applicants who indicated an interest in clerical work or who possess clerical skills to reapply for future clerical openings. Stevens must also designate an "Equal Employment Opportunity Officer," who is to investigate and attempt to resolve any black applicant's complaint of discrimination. Records of all such complaints and the efforts made to resolve them are to be maintained, and job applicants are to be informed by posted notice of this officer's name, location and function, as well as of the names and addresses of plaintiffs' counsel who they may contact if they are dissatisfied with this grievance process or its results. Proceedings to enforce the decree may be instituted before the Special Master by plaintiffs' counsel, by an aggrieved applicant through his or her own counsel, or by the Union on behalf of the aggrieved person, and Paragraph 38 further provides that the Special Master may act *sua sponte*. Counsel for the parties are to prepare an outline of these and the other remedial provisions of the decree, which is to be published in the local newspaper for three successive days.

Stevens is already required by the decree to submit quarterly reports containing information that will enable the plaintiffs, the Union, the Special Master and, most importantly, the district court to monitor compliance with the decree.[37] These reports will enable the court to periodically determine whether the decree, *sans* quotas is working effectively to eliminate hiring discrimination. In the event that the remedial measures which we have summarized do not appear to be accomplishing this goal, then,

[37] *See* Paragraph 40. Those who receive these reports will also be permitted to examine personnel records and other documents upon which the reports are based, and they may communicate with members of the class to satisfy themselves as to Stevens' compliance. Paragraph 48. Among the records available for this purpose are those which the employer is required to maintain concerning the name, race, sex and date of application of each job applicant, as well as the applications themselves which must be preserved for at least six months. Paragraph 7.

exercising the jurisdiction it has retained, the court may, on a record of the particular weaknesses or deficiencies of the relief measures, consider modification of the decree and tailor it to address the problem areas. If, at some future time, the district court concludes that under the demanding standards by which their propriety is determined, quotas should be imposed, it will then be time enough to consider the ultimate question of whether or not the imposition of hiring quotas, as an abstract issue, is permissible.

Promotional quotas

As we have already noted, certain of the hiring provisions of the decree may also be interpreted to require that Stevens promote its employees in accordance with numerical formulae. *See* nn.31 and 32, *supra.* Also, Paragraph 16 contains a purely promotional quota, requiring that until the number of blacks placed in various supervisory positions and the positions of "fixer" and "fixer trainee" equals "one-third of the total of such jobs in defendant's Roanoke Rapids operations," *no* vacancy in these positions shall be filled until affirmative efforts have been made to place a qualified black employee in such vacancy. The particular discriminatory practices which these remedies were designed to redress were, as in the case of hiring, Stevens' reliance upon the subjective conclusions of white officials in choosing persons for promotion, its failure to establish objective guidelines for promotions, and its failure to post notices of vacancies that were to be filled by promotion. Additionally, the court had found that the defendant had "reserved" its clerical, supervisory, and "fixer" jobs for whites.

In light of the district court's expressed apprehension that "the implementation of its decree may in fact cause considerable hardship if not indeed disruption of the operation of the defendant's business, with the very real

possibility that many of the members of the class sought to be protected by the decree as well as many innocent employees of the defendant may be adversely affected," Jt. App. 527, we see no reason for the imposition of the promotional quotas when there was no compelling need for them.[38] Our conclusion is based not only upon the court's own finding that "[d]uring the period 1967-1972 blacks were promoted in larger percentages than whites in four of defendant's plants and in lesser percentages in two of its plants," Jt. App. 329, but also upon the fact that effective relief can be afforded without resorting to this extreme procedure. The practices condemned by the court below as having a discriminatory effect are rectified by other of the injunctive provisions,[39] and there is no reason to assume that these measures will be ineffective.

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[38] The only stated justification for the quotas was the same one advanced for the hiring ratios. *See* n.36, *supra.*

[39] The steps prescribed by the decree to remedy promotional discrimination are as rigorous and specific as those addressed to discriminatory hiring. Under the decree, the defendant's reliance upon word-of-mouth notice to supervisors of the existence of vacancies is completely abolished by the requirement of the decree that, for three working days prior to filling any opening, Stevens post in each plant the name, shift and department of every job in which there is a vacancy in that plant, together with an explanation that a transferring employee will not suffer a decreased rate of pay as a result of such a change. Sufficiently detailed descriptions of each such job are to be filed with the court, scrutinized by the plaintiffs, and posted with the notice of vacancy. The practice of permitting white officials to subjectively designate persons eligible to succeed to vacancies is replaced by a procedure by which any employee may bid in writing for an opening and by which Stevens must fill all openings according to objective, racially-neutral and job-related standards previously filed with the court and made available to any interested employee. In the event two persons are equally qualified for a

Accordingly, we vacate both the hiring and promotional quotas ordered by the district court subject, of course, to the court's power to monitor progress under the decree and to supplement the remedies at some future time if for some reason not presently apparent, they should prove to be ineffective.

Period Of Limitations

The plaintiffs challenge the trial court's decision to limit the defendant's potential back pay liability to the period beginning three years prior to the filing of the class action on October 2, 1970, contending instead that the class members should be allowed to seek back pay for the consequences of discrimination suffered by them during the period of three years prior to September 5, 1969, which is the date upon which charges of discrimination were first filed by any of the named plaintiffs with the Equal Employment Opportunity Commission. Under the court's ruling, back pay would not be allowed for the period prior to October 2, 1967, while the plaintiffs' suggestion would extend the defendant's monetary liability back to September 5, 1966.[40]

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vacancy, plant seniority, not subjective considerations, is to govern the choice.

The defendant is prohibited from discouraging black employees from changing jobs and, once promoted, an employee is assured that if he is unable to perform the new job, efforts will be made to reassign him to a position equal in pay to his previous job. The employer must establish training programs to assist black employees in achieving the skills necessary to better jobs, and black employees are assured that they will benefit substantially from such programs; at least fifty percent of the trainees selected each year must be black (included at the suggestion of the appellant). Special provision is made for those clerically-minded employees who may not have been considered for a clerical job due to the confusion surrounding the type of application form they should have completed at the time they applied for work. They are to be invited to reapply and are to be offered future clerical vacancies which will be filled according to non-subjective criteria.

By the 1972 amendment, Title VII now expressly limits liability for back pay to a period beginning two years prior to the filing with EEOC of the charge upon which the subsequent judicial action is based, [41] but no limitation whatever was contained in the earlier version of the statue, and the amendment is inapplicable to actions, such as the present one, which were pending in the courts when the new legislation was enacted on March 24, 1972, Pub. Law No. 92-261,§ 14, 86-Stat. 113. In the absence of statuory direction, in pre-1972 Title VII actions the courts have routinely held that the period of potential monetary liability for continuing discrimination is governed by the applicable state statute of limitations, but that such statute is tolled by the filing of the EEOC charges which form the

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[40] The plaintiffs agree that the North Carolina three-year statute of limitations, N.C. Gen. Stat. § 1-52, governs; they take issue solely with the court's conclusion as to when it was tolled.

Although this litigation is also prosecuted under 42 U.S.C. § 1981, it is now settled that a state statute of limitations is not tolled in a § 1981 employment discrimination action by the filing of the EEOC charge, but rather by the filing of the complaint in court. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975). *See Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4 Cir. 1976). Back pay liability under that statute would thus at the most extend back three years from the filing of the class action complaint in this case and, accordingly, the reach of § 1981 is of no significance to the issue presented by the plaintiffs.

[41] 42 U.S.C.§ 2000e-5(g) now reads in part:

> "***Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission ***."

basis for the litigation.[42] *EEOC* v. *Enterprise Ass'n Steamfitters*, 542 F.2d 579, 590 (2 Cir. 1976), *cert. denied*, 430 U.S. 911 (1977); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301, 315-316 (6 Cir. 1975), *cert. granted, judgment vacated*, and *remanded* for consideration in light of *Teamsters* (which did not concern this matter), 431 U.S. 951 (1977); *United States* v. *Georgia Power Co.*, 474 F.2d 906, 925 (5 Cir. 1973). *Cf. Payne* v. *Weirton Steel Co.*, 397 F.Supp. 192 (N.D. W.Va. 1975). None of the published authorities cited by the court below are to the contrary and, accordingly, it was error to calculate the period of liability from the date of filing the class action instead of the date of filing the relevant administrative charges.[43]

[42] Because the filing of an EEOC charge of discrimination was a prerequisite to suit under Title VII before 1972, as it is now, allowing the statute of limitations to run between the filing of the EEOC charge and the filing of suit would unfairly penalize complainants for administrative delay in the processing of charges by shortening the period for which back pay is recoverable.

[43] For several reasons, the consequences of recalculating the period of monetary liability in accordance with this view do not appear to be great. First, the recalculation to extend the period affects only the size of potential back pay awards. It will not greatly increase the number of persons seeking relief, which is fixed by the definition of the certified class, nor will it redefine the conduct which has been adjudged discriminatory and for which compensation may be appropriate. *See* n. 3, *supra*. Second, the amount of the back pay awards for class members victimized by specific acts of the defendant, such as a discriminatory refusal to hire, is unaffected by this revision since the size of such recovery would in any event be calculated only prospectively from the date of the act. Given the unchallenged definition of the certified class and the evidence upon which judgment was entered, this date will not fall outside the three-year period prior to suit. The backward extension of the defendant's potential liability is relevant only as to cognizable claims resulting from any course of discriminatory conduct which began before the recalculated cutoff date and extended into the redefined period of limitations. Finally, because the period of limitations for purposes of back pay extends back from the date the first relevant

Bumping Provisions

Paragraph 32 of the remedial decree alters the defendant's practice of choosing employees for layoff on the basis of departmental seniority in the affected job category, providing instead that black employees may avoid layoff by exercising their plant seniority:

> 32. A member of either subclass [male or female] of present black employees who would otherwise be laid off shall be entitled to "bump" an employee with less plant seniority, as long as the junior employee's job can be performed by the subclass member with reasonable training by the defendant.

We disapprove of this provision of the decree.

First of all, we think it is indistinguishable in its effect from the "bumping" provision of the decree which we ordered eliminated in *Patterson* v. *American Tobacco Co.*, *supra*. In that case the district court had directed that immediately upon entry of the decree black and female employees could bump junior employees from preferred jobs, provided only that they had the requisite seniority and were willing to learn the new job. In rejecting such a procedure we relied heavily upon *Local 189, United Papermak. & Paperworkers* v. *United States*, 416 F.2d 980 (5 Cir. 1969), in which the court observed:

> White incumbent workers should not be bumped out of their *present* positions by Negroes with greater

EEOC charge was filed, that date will apparently vary for different types of claims. We note that the earliest charges in this case, filed on September 5, 1969, (the tolling date advanced by the plaintiffs), all apparently concerned only alleged refusals to hire black applicants for work. If, for example, the first charge of discrimination in job assignments was filed by a named plaintiff at some later time, then that date, not September 5, 1969, is the date on which the statute was tolled for all similar claims. *See United States* v. *Georgia Power Co.*, *supra*, 474 F.2d at 925.

> plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of the legislation.

416 F.2d at 988. We noted that "bumping is an unsettling process. Its domino effect adversely affects employees who have done no wrong and who, indeed, may have been the victims of discrimination." 535 F.2d at 268. Although Paragraph 32 is not quite so drastic as the provision in *Patterson* since it is operative only with respect to periods of layoff, it nevertheless represents a break with past practice and penalizes employees who, guilty of no wrongdoing, have had the expectancy that the security of their jobs is dependent not upon the seniority of persons in the plant at large, but rather of those working in the same department or job category.

Second, and we think most importantly, Paragraph 32 would require the significant alteration of a seniority system which itself violates neither Title VII nor § 1981. See pp. 19-20, *supra*. While we are not prepared at this time to hold that Title VII's insulation of bona fide seniority systems from a finding of illegality renders them completely immune to judicial alteration, we are of the opinion that in this case any such alteration is unnecessary. In affirming the district court's award of seniority relief to victims of discrimination in job assignments and promotions, pp. 47-48, *supra*, we have already approved of the provision made by the court below for the retention of seniority by past discriminatees who transfer to other departments under the reformed promotion and transfer practices instituted by the decree. The grant of this seniority to victims of Stevens' unlawful practices will, to the extent necessary, insulate them from layoff in their positions, without necessitating a drastic revision of the non-discriminatory system by which all employees have come to expect their layoff rights to be determined.

Claim-Filing Requirements

Finally, we find no reversible error in the district court's imposition of the claim-filing requirement prefatory to the proceedings for back pay relief. Rule 23(d) (2) of the Federal Rules of Civil Procedure sanctions this practice,[44] the express purpose of which in this case was the identification of all potential claimants to back pay and to establish a cutoff date beyond which claims would not be entertained. In view of the large number of persons who qualify for membership in the class, an unknown portion of whom also qualify for individual relief, we find the filing proviso to be an appropriate first step toward the eventual assessment and resolution of the compensation claims. *Robinson* v. *Union Carbide Corp.*, 544 F.2d 1258 (5 Cir. 1977) (dictum), *modifying* 538 F.2d 652 (5 Cir. 1976), *cert. denied*, 434 U.S. 822 (1977); *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441 (5 Cir. 1973); *Iowa* v. *Union Asphalt & Roadoils, Inc.*, 281 F.Supp. 391 (S.D. Iowa 1978); 7A Wright & Miller, Federal Practice and Procedure § 1793 (1972); 3B Moore's Federal Practice ¶ 23.72 (1976). Nor are we persuaded by the plaintiffs' argument that the court's provision for notice or its wording of the claim questionnaires will result in the wholesale dismissal of claims and is violative of due process and Title VII. The trial courts have great latitude in such matters, *Bing* v. *Roadway Express, Inc.*, *supra*,

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[44] Rule 23(d) (2) provides:

> In the conduct of actions to which this rule applies, the court may make appropriate orders:
>
> (2) requiring, for the protection for the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; * * *

485 F.2d at 448-449, and in the absence of persuasive evidence that the challenged procedure will frustrate valid claims, we will not require the district judge to depart from what facially appears to be an appropriate procedural course.

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The judgment of the district court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1988

LUCY M. SLEDGE, et al,
Individually and on behalf of all others similarly situated,
Appellees,

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, CLC,
Intervenor-Appellee,

v.

J.P. STEVENS & CO., INC.
Appellant.

No. 76-2150

LUCY SLEDGE, THOMAS HAWKINS, HERMAN JONES, MABLE MOODY MILES, CLARA PURNELL, PATRICIA PURNELL, LUKE PHIPPS AND MARIE ROBINSON,
Appellants

AND

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, CLC,
Intervenor-Appellee,

v.

J.P. STEVENS & CO., INC.,
Appellee.

No. 76-2303

LUCY M. SLEDGE, et al,
Individually and on behalf of all others similarly situated,

Appellants,

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, CLC,

Intervenor-Appellee,

v.

J.P. STEVENS & CO., INC.,

Appellee.

Filed Nov. 1, 1978

ORDER

Upon consideration of the appellees', Lucy Sledge, et al, petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Field with the concurrence of Judge Widener.

FOR THE COURT,

CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WILSON DIVISION

Civil No. 1201

REGINALD L. HARRISON, et al., individually and on behalf of all others similarly situated,

Plaintiffs

v.

J.P. STEVENS & COMPANY, INC.,

Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This employment discrimination class action instituted pursuant to the Civil Rights Act of 1866, 42 U.S.C. § 1981, and the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., was tried to the court without a jury for a period of several weeks in November, 1972, and thereafter briefed and argued by counsel in the spring of 1973. The case was taken under advisement awaiting the results of an appeal then pending from a decision of this court in a similar case involving the back pay issue which is central to this case. After a somewhat bizarre and tortuous procedural history in the appellate courts that case, *Albemarle Paper Company* v. *Moody*, 422 U.S. 405, 95 S. Ct. 2362 (1975), has now been decided on the merits and has quickly become a landmark in Title VII litigation. With its rulings and those of a plethora of other cases decided in the interim as guidance this case is finally ready for decision.

On the basis of a careful review of the evidence and the contentions of the parties as disclosed by the pleadings, briefs and arguments of counsel the following factual and legal determinations have been made. In making its find-

ings of fact the court has treated all the exhibits of plaintiffs and defendant as having been timely offered and received in evidence and all issues of admissibility of evidence have been resolved in favor of the plaintiffs. Except with respect to the individual plaintiffs the findings of fact substantially track those proposed findings submitted by plaintiffs considered by the court to be necessary to decision. Although requested to do so, the defendant did not submit proposed findings of fact.

Findings Of Fact

I. *The named plaintiffs*

1. (a) Reginald Harrison. This plaintiff alleged in the complaint that he was denied suitable employment at each of defendant's facilities in Roanoke Rapids. Prior to the trial of the case, however. he informed the court by letter that for personal reasons he desired to withdraw from the litigation. Thereafter plaintiffs filed a formal motion pursuant to Rule 21 that Harrison be dropped as party plaintiff to which motion Harrison's affidavit signifying his consent was attached. Harrison did not appear as a witness at the trial. The motion will be allowed.

(b) Raymond Barnes. This plaintiff alleges in the complaint that he was employed by Stevens at its Roanoke Fabricating Plant in Roanoke Rapids, but it is alleged that because of his race he was subjected to a "disproportionately long waiting period" before being hired. Barnes did not file a charge with the Equal Employment Opportunity Commission nor did he appear as a witness at the trial. No evidence was offered to substantiate the allegations on behalf of this plaintiff, and counsel have not submitted a proposed finding of fact relating to this plaintiff. As to him the action will therefore be dismissed.

(c) Robert Barnes. The complaint alleges that he was employed by Stevens at its Patterson Plant in Roanoke Rapids. He did not appear as a witness at the trial, but

from attachment H to "plaintiffs' designation of documents sought for inspection and copying . . ." filed October 17, 1972, it being a record of the "termination of employment" of Robert L. Barnes, the court finds that this plaintiff voluntarily quit his employment with Stevens because he was moving to Washington, District of Columbia. His overseer indicated on the form that he would recommend this plaintiff for another job in the plant and would want him to return to his department in the future. The charges of discrimination against this plaintiff are not proven, and the action as to him will be dismissed.

(d) Diann Faulcon. The complaint alleges that this plaintiff was employed by Stevens at its Roanoke Fabricating Plant at the time of the institution of the action. It is further alleged, however, that she was subjected to a "disproportionately long waiting period" before being hired. She did not appear as a witness at the trial and no other evidence was offered to substantiate the allegations of the complaint relating to her. Counsel have not submitted a proposed finding of fact with respect to this plaintiff, and the charges of discrimination as they relate to her remain unproved. The action as it relates to this plaintiff will be dismissed.

(e) Edward Hawkins. The complaint alleges that this plaintiff was employed by Stevens at its Roanoke Plant No. 1 in Roanoke Rapids at the time of the institution of the action. The complaint further alleges that this plaintiff, because of his race, was initially assigned to a lower-paying or less desirable job than his average white counterparts. He did not appear as a witness at the trial nor did he file any charge with the EEOC. Counsel have not requested a finding of fact as to this plaintiff, and the charges of discrimination against him remain unproved. The action as it relates to him will be dismissed. (See counsel's disclaimer at Tr. 6.)

(f) Thomas Hawkins. The complaint alleges that this plaintiff was denied employment at each of defendant's

facilities in Roanoke Rapids. This witness testified at the trial (Tr. 136), and a copy of his application for employment with Stevens and copies of three charges filed by him with the EEOC were introduced as plaintiffs' Exhibit 37. From the evidence the court finds that Thomas K. Hawkins is a Negro citizen of the United States who at the time of his application for employment with Stevens on July 21, 1969, was twenty-one years of age, married, and residing in Warren County, North Carolina. He had a high school education and had completed one and a half years of college. His application for employment was filed during the summer months when most college students are not attending school, and whether Hawkins continued his college education in the fall of 1969 was not shown by the evidence.

The only prior job held by Hawkins was that of sheet metal apprentice which he held with Bethlehem Steel Company at Sparrows Point, North Carolina, for an eighteen-month period beginning March, 1967. He left that job to go to school. In response to the inquiry on the application-for-employment form as to the type of textile work he was best qualified to do Hawkins wrote, "Would like to discuss." He listed as one of his personal references Mr. T. T. Clayton, one of the attorneys who represents him in this action. Five days after his application for employment was dated Hawkins filed a charge of employment discrimination against Stevens with the EEOC stating the unfair thing done to him thus: "I applied to J. P. Stevenson (sic) for employment. They refused to hire me while at the same time they hire whites." This written charge to the EEOC was witnessed by one Joe P. Moody, who is known to the court to have been active on his own behalf and in assisting others in preparing charges of racial discrimination for filing with the EEOC against eastern North Carolina industries and in conducting employment discrimination litigation against them.

The foregoing facts have left the court with the impression that Hawkins was not seriously seeking employment

with Stevens but rather filed his application with the fairly certain knowledge that one with his qualifications would not be employed in the short space of five days following which he set about exhausting his EEOC remedies with the view to joining in this lawsuit. Be this as it may, there is not the slightest, much less a preponderance, of evidence to show that the failure of Stevens to hire Hawkins was racially motivated. The action as it relates to him will therefore be dismissed.

(g) Herman Jones. The complaint alleges that this plaintiff was formerly employed by Stevens, but it is alleged that because of his race he was initially assigned to a lower-paying or otherwise less desirable job than his average white counterparts and that he was denied promotion on account of his race. Jones testified at the trial (Tr. 139), but significantly he was asked no questions by counsel for either side concerning his initial job assignment which was that of janitor in a warehouse or his failure to achieve a promotion. There was introduced plaintiffs' Exhibit 38, his employment history, for which Jones vouched, and from this record it appears Jones was employed from October 17, 1962, to August 3, 1970, on which date he "voluntary quit—walked off job." Jones first filed a charge of discrimination with the EEOC on October 27, 1969, but continued to work for Stevens until the following August when he voluntarily quit. Nine days thereafter he re-dated and presumably re-filed his charge of discrimination with the EEOC which one month later mailed him a right-to-sue letter under date of September 15, 1970. Although this letter tendered the services of the Commission "upon the request of all parties . . . in an effort to resolve this matter through conciliation," it is not indicated that Stevens was furnished a copy of this letter, and in any event there is no evidence that any effort at conciliation was attempted by anyone at any time. Instead, the plaintiff Jones joined with the other named plaintiffs in filing this action on October 2, 1970.

The court is of opinion that when an employee joins in an action of this kind following charges of the serious nature made by this plaintiff and then comes to court and testifies, he should give some testimony, either personally or through others, tending to substantiate the charges and should not be allowed to rest on the conclusory statements set forth in a written charge filed with the EEOC as this plaintiff has done. The evidence before the court permits only the finding that plaintiff Jones began his employment as a janitor, was transferred to "warehouseman" three and one-half years later which position he was filling at the time of the voluntary termination of his employment. He had been enrolled in the company's profit-sharing plan on January 1, 1966. There is no evidence from which the court can find that Jones was qualified to perform any other job than that of janitor at the time of his employment nor that he was qualified for any job higher than that of warehouseman at the time of his departure. In short, this plaintiff has not proved his case, and as to him the action will be dismissed.

(h) Mable Moody Miles. The complaint alleges that this plaintiff was employed by Stevens at its Patterson Plant at the time of the institution of this action. As in the case of Herman Jones it is further alleged that she was initially assigned to a lower-paying or otherwise less desirable job than her average white counterparts and that she was denied promotions because of her race. In her charge filed with the EEOC under date of October 28, 1969 (and witnessed by J.P. Moody) this plaintiff complained that she wanted to work on the first shift but that she did not get this duty because of her race. She further stated that she was not told how to get a better job because vacancies are not posted; that whites are allowed more time off and are able to get into the weaving room, sewing and cloth room when they are first hired but that black females get assigned to the "preparation." An amended charge filed August 27, 1970, brought forward these same charges in more legible and legal language.

In her testimony at the trial (Tr. 115 et seq.) plaintiff Miles testified that she was still employed with Stevens and had been since June, 1967; that her starting pay had been 1.77 an hour but that she was now making 2.50 an hour; that she "imagined" that she had first inquired about employment as early as 1962; that she was told to come back in two days or more for an interview; that she did return a number of times but she did not know how many; and that her previous employment had been in a dry cleaning business. On cross-examination she testified that she had had promotions from time to time since she had been employed; that her job was one of the highest-paying jobs in the department in which she was working; that she had made no complaint to the EEOC about the delay in getting her job initially; and that her chief complaint now was a failure to get transferred to the first shift and would be willing to take less money if she could do this; that only one person (race not indicated) had been transferred to the first shift ahead of her. She declined to divulge this person's name.

Accepting all of the foregoing evidence as true the court is unable to find by a preponderance thereof that the allegations of discrimination against this plaintiff Miles have been substantiated, and the action as it relates to her must therefore be dismissed.

(i) Luke Phipps. The complaint alleges that plaintiff Phipps was employed by Stevens at the time of the institution of this action and that because of his race he was initially assigned to a lowerpaying or otherwise less desirable job than his average white counterparts and that he was denied promotions because of his race. Phipps did not file a charge with the EEOC, but he did testify at the trial (Tr. 134) only to the extent of identifying plaintiffs' Exhibit No. 36 which is his employment history with Stevens. This shows that he was initially employed on April 3, 1969, as a warehouseman; that his employment terminated on January 23, 1971, because of sickness; that he was re-

employed on February 8, 1971, as a warehouseman and that he was discharged on June 26, 1971, reason not shown but the form stating, "see NOL."

The court fails to find by a preponderance of the evidence that the plaintiff Phipps was the victim of racial employment discrimination, and the action as to him will be dismissed.

(j) Clara Purnell. The complaint alleges that she was denied employment at each of the defendant's facilities in Roanoke Rapids because of her race. In her charge of racial discrimination filed with the EEOC first under date of August 27, 1969, and renewed under date of August 12, 1970, plaintiff Purnell states that she applied for employment with Stevens off and on between 1960 and 1969; that she was repeatedly told that her application was still in effect but that there were no vacancies; that she believes that white applicants are being hired; that she believes she has been denied employment on grounds of race; and that she believes that Stevens discriminates against Negro employees.

The only written application for employment introduced in evidence for this plaintiff is dated July 26, 1972, almost two years after the action was instituted. It is plaintiffs' Exhibit 35. It indicates that plaintiff was forty-six years of age at the time; that she had had three years of previous work experience, all as a maid, and that she wanted to change jobs because she was "tired of Sunday work." The inquiry on the form, "What type of textile work are you best qualified to do?" was left blank. This plaintiff testified at the trial (Tr. 128) that she was never employed by Stevens. To the question, "How many times did you apply for work?", she gave no answer, but to the further question, "More than once?", she replied "More than once." She stated that she finished high school. She was asked no questions on cross-examination.

On this evidence the court is unable to find plaintiff Clara Purnell's allegations of discrimination to be substantiated, and the action as it relates to her must be dismissed.

(k) Patricia Purnell. The complaint alleges that this plaintiff was denied employment at each of defendant's facilities in Roanoke Rapids because of her race and because she engaged in civil rights activities. In her charge of discrimination filed with the EEOC on August 27, 1969, and again on August 12, 1970, Patricia Purnell stated that she first applied for employment with Stevens in April, 1968 (approximately) and was told that they were not hiring women. The two applications for employment introduced for this plaintiff (plaintiffs' Exhibit 33) were dated October 23, 1969, and June 13, 1972. Testifying at the trial (Tr. 110) this plaintiff did not place the date of her first application for employment with Stevens earlier than October 23, 1969, that she did not know how many times she had sought employment with Stevens but that "I went back a number of times," that she had not been employed prior to making application with Stevens and in fact had never had a job of any kind up until the time of the trial. Asked by the court as to what kind of work she intended to do if she obtained employment from Stevens this plaintiff replied, "I applied for textile work, sewing and things like that." On her first application blank she had indicated that she was best qualified to do "any kind" of textile work, but on the second application this space was left blank.

In her first application she indicated that she could work on the morning shift, and in the second she states that she could work on any shift.

This plaintiff is the daughter of the plaintiff, Clara Purnell, and as to each of them there was an allegation in the complaint that they were refused employment because of

their civil rights activities. No testimony was elicited from either of these plaintiffs concerning this allegation.

On the basis of the evidence offered the court is unable to find by a preponderance thereof that the plaintiff Patricia Purnell was denied employment by Stevens or otherwise discriminated against on account of her race. The action as it relates to her will be dismissed.

(l) Marie Robinson. The complaint alleges that this plaintiff is presently employed by Stevens and that she has been denied promotion on account of her race. In her charge to the EEOC dated October 28, 1969, witnessed and sworn to by J. P. Moody on August 18, 1970, this plaintiff stated that she worked for Stevens for four years in preparation department as a "spooler"; that "less senior and less qualified whites" have better jobs; that "about two week ago I asked for a promotion to the weave room but they would not give it to me;" that vacancies are not posted; that whites are allowed more time off and white females are able to get into the weaving room, spinning room and cloth room when they are first hired "because they are easier and higher-paying" and that black females get assigned to the preparation department.

This witness testified at the trial (Tr. 142) and her employment history record and the charges made by her to the EEOC were introduced as plaintiffs' Exhibit 39. This record shows that the plaintiff Robinson was employed on September 24, 1965, as a "winder tender" and that on February 26, 1969, she became a "spooler tender." She was asked no questions concerning her efforts to get transferred to the "weave room", but on cross-examination she testified that hers was one of the better-paying jobs in her department; that her earnings were based on her production; and that she had been told by her overseer that she was one of the higher earners in this job. She was unable to state her average earnings per hour, "because I haven't

had nobody to tell me my statement lately. It's been quite some time now since they've told me my rating."

In the absense of any evidence that this plaintiff was qualified for some position other than the one she has been filling, that a vacancy existed and that some white person got the job the court is unable to find by a preponderance of the evidence that the plaintiff Marie Robinson has been the victim of employment discrimination on account of her race, and the action as it relates to her must therefore be dismissed.

(m) Lucy Sledge. The complaint alleges that this plaintiff was employed by Stevens at its Roanoke Fabricating Plant and was laid off in July, 1968; that Stevens has refused to reinstate her at any of its Roanoke Rapids facilities; and that she was initially assigned to a lower-paying or otherwise less desirable job than her average white counterparts. In her charge of discrimination dated January 8, 1970, and filed with the EEOC on March 6, 1970, this plaintiff states that she was laid off by Stevens and has been given no reason why she has not been recalled; that about eight months after she was laid off they called back a white girl who was laid off at the same time; that she has been returning to the personnel office of Stevens but still has not "received any prospective promises"; and that since then Stevens has hired several people, and "I think this is totally unfair and discriminating."

The plaintiff Sledge's employment history shows that she was first employed on July 18, 1966, as a "terry hemmer"; that she was transferred to "banding and binding" on August 14, 1979; that she took a leave of absence because of childbirth on November 24, 1967; that she was reemployed on April 16, 1968, as a "terry inspector"; and that she was laid off on July 11, 1968, because there was "no work available." (Plaintiffs' Exhibit 32.)

Plaintiff Sledge testified at the trial (Tr. 106) that she was now living in Trenton, New Jersey; that she had un-

dertaken on perhaps as many as five times to obtain re-employment with Stevens, the last time being in 1969, and that she believes the charges made by her to the EEOC were true. She was given "good" ratings by her supervisor and was recommended for re-employment (Plaintiffs' Exhibit 102). The first white person was recalled about eight months after the layoff (Plaintiffs' Exhibit 32), but the evidence does not reveal this person's seniority as compared to plaintiff's. The dates on which plaintiff re-applied are not shown nor does it appear that there was a vacancy on any such date. Defendant was hiring blacks in substantial numbers during the period in question, and the court cannot assume that this plaintiff was singled out for rejection simply because she was black. Her personal action must therefore fail.

II. *The defendant*

2. The defendant J.P. Stevens & Company, Inc. is a corporation doing business within the Eastern District of North Carolina. Edwin Akers is administrative assistant to the general manager of Stevens' facilities in Roanoke Rapids, North Carolina (Tr. 615), and James B. Miller is the personnel director for these facilities (Tr. 313).

3. Stevens presently operates the following eight plants and three office facilities in Roanoke Rapids, North Carolina:

Plants:
Delta Finishing Plant No. 4
Patterson Plant
Roanoke Fabricating Plant
Roanoke Plant No. 1
Roanoke Plant No. 2
Roanoke Printing Plant
Roanoke Yarn Dye Plant
Rosemary Greige Plant

Office Facilities:
Central and Administrative Office
Customer Service Office
Information Services Center

4. Each of these plants and offices uses the same personnel office and follows the same personnel policies. The sole exception is that, since 1971, hiring decisions relating to the Customer Service Office must be approved by Stevens officials in New York City, and hiring decisions relating to the Information Services Center must be approved by Stevens officials in Charlotte, North Carolina. Prior to 1971, the Customer Service Office and the Information Services Center were treated as parts of the Central and Administrative Office (Tr. 630, 631, 714, 715; plaintiffs' Exhibit No. 105).

5. Applicants for positions in the Customer Service Office and in the Information Services Center go through exactly the same process as applicants for positions in the plants or in the Central Office, except for the additional approval of out-of-town officials (Tr. 716, 717). These out-of-town officials ordinarily follow the hiring recommendations made by the Stevens officials in Roanoke Rapids. (Tr. 717)

6. Until 1956, the Central Office and the present plants in Roanoke Rapids, with the exception of the later-constructed Roanoke Fabricating Plant, were owned and operated by the Roanoke Mills Company, the Rosemary Manufacturing Company and the Patterson Manufacturing Company. Each of these companies was wholly owned by the Simmons Company. In 1956, Stevens purchased these three companies from the Simmons Company, assuming all their assets and liabilities (Tr. 686-688).

7. At all times since July 2, 1964, Stevens has employed more than 100 persons at its Roanoke Rapids facilities, and has there been engaged in the manufacture of textiles, an industry affecting commerce.

III. *Stevens Hiring and Promotion Procedures*

8. (a) An applicant for employment by the defendant in its Roanoke Rapids facilities goes first to the personnel office and completes an application for employment form. This form contains blanks for the applicant's name and address, age, sex, certain physical characteristics, education, employment history, names and addresses of parents, children if any, military service and personal references. There are also blanks in which the applicant states what type of textile work he is best qualified to do and what shift he can work.

(b) Following the completion of the application form there is an interview with a personnel officer who may tell the applicant to come back later or that there is no job available at that time. If the personnel officer considers the applicant to be a desirable prospective employee and there are vacancies, the applicant is given a set of tests to take.

(c) The tests are for visual acuity and color blindness, and there are pinboard, formboard and perception tests. There is nothing to indicate that blacks do worse on any of these tests than whites.

(d) Assuming the test results are satisfactory the applicant is then sent to a department head for another interview. The department head is furnished a copy of the application and an indication of the applicant's test scores. The department head then accepts or rejects the applicant based upon his impression of the person.

(e) If the applicant is accepted, he returns to the personnel office to furnish the information necessary to complete his record of employment. This would include insurance information, etc. (Tr. 314 et seq.).

9. There are a large number of different job categories in Stevens' facilities in Roanoke Rapids, but it has never prepared a list of specific qualifications for hiring and initial assignment to, or for promotion to, any specific job category. (Tr. 355.) Hiring decisions are primarily made by the personnel office, and it has little knowledge of any specific qualifications for specific jobs, other than a general requirement that employees be ablebodied and genuinely interested in working (Tr. 359, 368-372).

10. There are specific requirements for a given job, but these are known primarily to the person supervising the job, usually the department overseer, and the company tries to get the best qualified person for a job by relying on the overseer's knowledge about specific job qualifications and his appraisal of the applicant's ability to meet the qualifications, the overseer having the power to accept or reject an applicant.

11. The decision to promote an employee is made by departmental overseers. Normally, the personnel office has no involvement in the selection of employees to promote (Tr. 515). The company has not established any systematic guidelines under which supervisors should make decisions on which employees to promote to a particular job category. (Tr. 533.) The overseer simply makes an overall evaluation of the person taking into consideration his interest, his ability to perform his job, his apparent ability to perform more difficult jobs, his attendance and the manner in which he gets along with other employees (Tr. 534).

12. When there is a vacancy in a job category in a department, it is ordinarily filled by the promotion of an employee in the same department. If this is not done, an applicant would ordinarily be hired to fill the vacancy.

13. When a vacancy is not filled by a shift change or by the promotion of an employee within the same department, it is possible that the vacancy may be filled by the promotion of an employee from another department (Tr. 516, 572-573). It is, however, the usual practice for such a vacancy to be filled by an applicant hired for the purpose

even though there may be a more qualified employee in another department (Tr. 516-518).

14. The defendant does not have a policy of notifying departmental overseers of vacancies in other departments, and an overseer filling a vacancy would not ordinarily know of the existence of a qualified employee in another department unless the employee's supervisor had approached him with the information (Tr. 518).

15. Notices of job vacancies are not posted so that employees in the same or different departments can ask to be considered for promotions to such vacancies, and thus bring themselves and their qualifications to the attention of the overseer in whose department there is a vacancy to be filled (Tr. 516).

16. The promotion of employees to jobs in different departments is thus dependent for the most part upon the operation of an informal "grapevine type network" among the overseers.

17. At the time of the trial there were 165 assistant overseers, overseers and general overseers in the defendant's Roanoke Rapids plants, and all of them were white. (Defendant's Exhibit 4). There was no evidence that defendant had ever employed a black assistant overseer, overseer or general overseer (Tr. 364).

18. Stevens submits annual EEO-1 reports for each of its Roanoke Rapids facilities to the United States Equal Employment Opportunity Commission. Each of the five annual reports submitted between April 4, 1968 and April 7, 1972 showed the company to have between 208 and 213 officials and managers, all of whom were white.

19. In addition to the foregoing findings of fact relative to Stevens' hiring and promotion procedures the court finds as facts and adopts as its own the proposed findings of fact submitted by the plaintiffs numbered 26, 27, 29, 31, 33, 34, 35, 38, 39, 40, 41, 42, 43, 47, the first sentence

of No. 48, 59, 60, 61 and 62. These adopted findings are reproduced and attached hereto as Appendix I.

IV. *Factual Conclusions Based on Hiring and Promotion Procedures*

On the basis of the findings of fact concerning Stevens' hiring and promotion procedures the court makes the following factual conclusions:

20. Decisions in hiring and in promotion are based primarily on the subjective opinions of personnel officials and of departmental overseers.

21. Stevens' policy of heavy reliance upon subjective considerations in hiring and promotion, and its policy of relying exclusively upon an informal "grapevine" network among departmental overseers in making interdepartment promotions, in effect gives the officials making these decisions the power to discriminate. This finding is strengthened by the fact that all officials making these decisions are white, and all such officials have always been white.

22. Stevens has never adopted any systematic means of preventing these officials from using their powers so as to discriminate, and its only evidence that they do not in fact use their powers in such a fashion is the subjective feeling of company officials that the officials making personnel decisions would never do such a thing.

23. Decisions to promote are made by departmental overseers without the aid of any company standards. Overseers have the power to impose any criteria they wish, and different overseers may apply different criteria in filling vacancies to the same job categories in their different departments.

24. In summary, the defendant's procedures for hiring and promotion not only afford opportunities for discrimination but in many instances are conducive to discrimination.

V. *Discrimination in Hiring*

25. From mid-May 1969 until the end of that year—the earliest period for which figures were available—the rate of successful applicants for employment with Stevens for each race/sex group showed the following:

	Applicants	Hires	Per Cent Successful In Getting Jobs
White Males	169	145	85.8%
Black Males	284	173	60.9%
White Females	238	129	54.2%
Black Females	256	65	25.4%

If the number of total hires of each sex remained the same, and if blacks had had the same hiring rate as whites, 26 more black males and 35 more black females would have been hired from mid-May to December 31, 1969.

26. In 1970, the following table shows the rate of successful applicants for each race/sex group:

	Applicants	Hires	Per Cent Successful In Getting Jobs
White Males	320	295	92.2%
Black Males	455	247	54.3%
White Females	342	193	56.4%
Black Females	426	140	32.9%

If the number of total hires of each sex remained the same, and if blacks had had the same hiring rate as whites, 71 more black males and 45 more black females would have been hired in 1970.

27. In 1971, the following table shows the rate of successful applicants for each race/sex group:

	Applicants	Hires	Per Cent Successful In Getting Jobs
White Males	474	328	74.5%
Black Males	719	301	41.9%
White Females	406	229	56.4%
Black Females	626	127	20.3%

If the number of total hires of each sex remained the same, and if blacks had had the same hiring rate as whites, 78 more black males and 89 more black females would have been hired in 1971.

28. From January 1 to June 30, 1972—the latest date for which the figures were available at trial—the following table shows the rate of successful applicants for each race/sex group:

	Applicants	Hires	Per Cent Successful In Getting Jobs
White Males	274	164	59.9%
Black Males	510	153	30.0%
White Females	274	133	48.5%
Black Females	610	110	18.0%

If the number of total hires of each sex remained the same, and if blacks had had the same hiring rate as whites, 53 more black males and 58 more black females would have been hired in the first six months of 1972.

29. Findings 25 through 28 above show steadily worsening differences in the hiring rates of black males as compared to white males, and of black females as compared to white females, and there is no evidence in the record that explains these different hiring rates for blacks and whites in these recent years. Defendant's explanation that it tried to place the best qualified person on each job (Tr. 829) cannot be accepted in the face of the fact that qualifications play such a minor role in the hiring process and the lack of evidence to show that blacks do more poorly than whites on the tests given applicants [Finding 8(c)].

30. Further, plaintiffs showed that a number of specific black persons with excellent qualifications were not hired (Plaintiffs' Exhibit No. 96; Plaintiffs' Exhibit No. 99; Tr. 323-340 and 545-550). These included a number of persons with one or more years of college, a number of persons

with previous office experience, a number of persons with training in keypunching or data processing, and a number of persons with coursework or degrees in business administration. Some of these persons had returned to the personnel office a number of times seeking employment, including Ellen L. Ellis (19 times in addition to her original visit), Bettie Squire Moody (6 times in addition to her original visit), Viola Sylvia Harris (9 times in addition to her original visit), Viola Williams (6 times in addition to her original visit), Marian Harris (3 times in addition to her original visit), Shery Bell (3 times in addition to her original visit), Wilford Hardy (on both applications, 6 times in addition to his original visit), Cleophus L. High (5 times in addition to his original visit), Donnel Mills (3 times in addition to his original visit), Herman E. Brown (3 times in addition to his original visit), and Louise Mason (22 times in addition to her original visit) (*Id.*). With the exception of Ellen L. Ellis, none were ever hired. (See further Finding No. 96 infra.)

31. Based upon findings 25 through 30 above, the court finds that the only explanation for the marked disparities in hiring between black males and white males, and between black females and white females, is racial discrimination.

VI. *The Reservation of Certain Job Categories to Whites, and of Certain Others to Blacks*

A. *Clerical Jobs*

32. Stevens' annual EEO-1 reports to the EEOC show the following entires with respect to clerical jobs:

Date of Report	Number of Office and Clerical Jobs	Race of Clerical Employees
April 4, 1968	254	254 whites, no blacks
May 9, 1969	254	253 whites, 1 black
May 5, 1970	261	260 whites, 1 black
March 19, 1971	243	241 whites, 2 blacks
April 7, 1972	212	210 whites, 2 blacks

33. In addition, there have since sometime in 1971 been over a hundred clerical employees in the Customer Service Office and the Information Services Center (Tr. 630-632, 715). At the time of the trial, there was no black clerical employee in the Information Services Center. The only one in the Customer Service Office was Janie Porch, a temporary employee (Tr. 719).

34. Janie Porch was hired by Stevens on August 16, 1965 as a spinner learner in the Roanoke No. One plant. She subsequently became a spinner. On January 7, 1969, she applied for a clerical job, stating on her application form that she was then attending Halifax Technical Institute and taking typing courses. On February 1, 1970, she became a file clerk in the Information Services Center. She later transferred to the Customer Service Office as an order entry clerk. On July 15, 1972, she voluntarily became a "temporary"—or part-time—employee. (Plaintiffs' Exhibit 101, Deposition of James B. Miller, pp. 98-100.)

35. From 1951 until Janie Porch came to the Central Office on February 1, 1970, neither its predecessor company nor Stevens had ever had a black clerical employee in the Central Office (Tr. 729).

36. From December 29, 1968 through July 29, 1972, Stevens hired a substantial number of new employees for its Central Office (Tr. 745; Plaintiffs' Exhibit No. 126). From December 29, 1968 until December 26, 1970, Stevens hired a substantial number of new clerical employees for the Information Services Center (Tr. 747; Plaintiffs' Exhibit No. 127).

37. At the time of the trial there had been a recent large increase in the number of clerical jobs in Stevens' facilities in Roanoke Rapids (Tr. 748), and at that time there were over 310 clerical employees in all of Stevens' facilities, including the Customer Service Office and the Information Services Center. Before these latter two facilities were excluded from the Central Office's EEO-1 reports, there were

a total of between 243 and 261 clerical employees, depending on whether the change occurred before March 19, 1971 or after that date. In 1971 and 1972, therefore, between 50 and 70 new clerical jobs had to be filled, in addition to normal turnover.

38. At the time of the trial over ninety black persons who appeared by education or experience to be qualified for office or clerical work had applied to Stevens for employment (Plaintiffs' Exhibit No. 96; Plaintiffs' Exhibit No. 99, Part 1 and Part 2). With the exception of Ellen L. Ellis, none was hired. (See Finding 96 infra.)

39. The defendant has advanced no explanation for the total absence of blacks from clerical jobs in its Roanoke Rapids plants until 1969 and from its Central Office until 1970, and for the near-total absence of blacks from clerical jobs from these dates to the present, other than the general contention that, in prior years, blacks were unable to, or did not choose to, compete with whites. Absent some legally acceptable explanation, the failure of defendant to hire blacks in clerical jobs was discriminatory.

B. *Supervisory Jobs*

40. At the time of the trial there were 165 assistant overseers, overseers and general overseers in Stevens' Roanoke Rapids plants, all of whom were white. There had never been a black assistant overseer, overseer, or general overseer. From 1968 to 1972 Stevens always had over 200 "officials and managers", all of whom were white.

41. In mid-May, 1969, Stevens had 36 foremen and foreladies, all of them white (Plaintiffs' Exhibit No. 58). At the time of the trial, there were 55 foremen and foreladies, 9 of them black. (Defendant's Exhibit No. 4.) Five of these nine black persons were in traditionally-black warehouse departments. There were a number of different pay rates for foremen and foreladies in different departments and plants. The average pay rate of white foremen and foreladies was $3.02 hourly; the average pay rate of black foremen and foreladies was $2.93 hourly. Foremen do not make personnel decisions; only departmental overseers have this function.

42. The defendant advanced no explanation for the total absence of black persons in supervisory jobs until 1969, and for their absence from all but the bottom rung of supervisory jobs, other than the general contention that, in prior years, blacks were not able to, or did not choose to, compete with whites.

43. The court finds that Stevens reserved all supervisory jobs for whites until 1969, and all but the lowest level of supervisory jobs for whites thereafter.

C. *Jobs as Weaver*

44. The job of weaver is one of Stevens' relatively high-paying jobs for both males and females (Tr. 350-351). At the time of the trial weaving jobs paid $2.74 an hour (Defendant's Exhibit No. 4). Previous experience is not required in order to be assigned to this job, and the defendant frequently hired inexperienced persons off the street for weaving jobs (Tr. 350).

45. In mid-May, 1969, Stevens had 73 male weavers and 209 female weavers. Only three of the male weavers, and four of the female weavers, were black (Plaintiffs' Exhibit No. 58).

46. From May 18, 1969 to June 30, 1972, Stevens hired 119 males and 99 females whom it initially assigned to the job of weaver. Eight of the males and 39 of the females were black. In this same period, Stevens also hired 21 males and 17 females whom it initially assigned to the job of weaver learner. None of the males and just one of the females were black (Plaintiffs' Exhibit No. 92; Plaintiffs' Exhibit No. 105). Of those persons so hired and initially assigned to the jobs of weaver or weaver learner, 34.5% of the females—but only 5.7% of the males—were black.

47. In this same period of time, 932 white males and 874 black males were hired. 14.2% of the white males hired—and only 0.9% of the black males hired—were initially assigned as weavers or weaver learners. It thus appears that, for males hired in this period of just over three years, the average white male hire had a chance of being assigned to a job as weaver or weaver learner over fifteen times greater than the chance of an average black male hire.

48. The defendant has advanced no explanation for the near-total absence of black persons in weaving jobs until May of 1969, and for the strong racial disparity in the assignment of new male hires to weaving jobs from May of 1969 to the end of June, 1972, other than the general contention that, in prior years, blacks were not able to, or did not choose to, compete with whites.

49. The court finds that Stevens ordinarily reserved the job of weaver for whites until May, 1969. Thereafter, it fully eliminated the racial restriction insofar as it affected black women, but kept the restriction in force insofar as it affected black men.

D. *Jobs as Fixer*

50. A fixer is a relatively high-paid person who repairs looms or other machines and keeps them in good running condition. Only males are placed in the job of fixer, and such employees are ordinarily required to work in and learn the job of weaver before being placed in the job of fixer. Male weavers are considered for promotion to a vacancy in the job of fixer before any other employee and before any applicants. Conversely, employees who have never been weavers stand little chance of becoming fixers (Tr. 351, 374-376).

51. In mid-May of 1969, Stevens employed 180 fixers in its Roanoke Rapids facilities, of whom only one was black (Plaintiffs' Exhibit No. 58). At the time of the trial defendant was still employing 180 fixers, of whom only two were black (Defendant's Exhibit No. 4).

52. In mid-May of 1969, the number of white male fixers was twice the number of white male weavers, indicating that most white male weavers are readily promoted. The number of black male fixers was one-third the number of black male weavers, indicating much less of a chance for promotion. At the time of the trial eight more black males had been hired as weavers, but there was only one additional black male fixer. The opportunity of a male weaver to be promoted to fixer is much less for blacks than it is for whites.

53. Stevens has advanced no explanation for the past and present near-total absence of blacks from the job of fixer, other than the need for fixers to have first worked as weavers, and other than the general contention that, in prior years, blacks were not able to, or did not choose to, compete with whites.

54. The court finds that Stevens has reserved and still reserves the job of fixer for whites. Part of this racial restriction is accomplished by the continuing discrimination against black males in the job of weaver. Even where black males have become weavers, however, they are still discriminatorily denied promotions to the job of fixer.

E. *Jobs as Warehouseman*

55. At $2.07 an hour, the job of warehouseman is one of Stevens' lowest paid job categories (Defendant's Exhibit No. 4). In mid-May, 1969, there were 48 warehousemen, 45 of them black. The three white warehousemen were all assigned to the Rosemary Greige plant. They worked in the carding department, where there were no black warehousemen. The four black warehousemen in the Rosemary plant were assigned to the repair shop, where there were no white warehousemen (Plaintiffs' Exhibit No. 58). At the

time of the trial there were 72 warehousemen, 64 of whom were black (Defendant's Exhibit No. 4).

56. From May 18, 1969 to June 30, 1972, Stevens hired 98 persons whom it initially assigned as warehousemen. Eighty-one of them were black (Plaintiffs' Exhibit No. 92).

57. There were no white warehousemen in the Central Office. All of the warehousemen in this office have been black persons since at least 1951 (Tr. 728).

58. Stevens has advanced no explanation for the past and present disproportionate number of black persons in low-paid jobs as warehousemen, or for the disproportionate assignment of new black hires to these jobs.

59. The court finds that Stevens has ordinarily reserved the low-paying job of warehouseman for blacks.

VII. *Discrimination in Job Assignments of Male Hourly Employees*

A. *Racial Disparities in Pay Rates Among All Male Employees*

60. The following table shows the average pay rates for black and white male hourly employees as of October 1, 1972, and as of the end of each year from 1967 through 1971:

Year of Pay Rate Information	Average Black Male Rate of Pay At This Time	Average White Male Rate of Pay At This Time	Average Hourly Difference	Average Annual Difference
October 1,1972	$2.33	$2.67	34.3¢	$713.44
End of 1971	2.33	2.67	33.4¢	694.72
End of 1970	2.19	2.53	34.5¢	717.60
End of 1969	2.08	2.40	31.9¢	663.52
End of 1968	1.95	2.26	30.6¢	636.48
End of 1967	1.84	2.12	28.1¢	584.48

(Plaintiffs' Exhibits Nos. 7 and 14.) This table shows a generally increasing disparity in average pay rates between black males and white males from 1967 to the time of the trial.

61. As of October 1, 1972 for current hourly employees:

(a) 34.8% of the black males—but only 10.4% of the white males—earned $2.20 an hour or less;

(b) 2.7% of the black males—but 35.0% of the white males—earned $2.81 an hour or more. (Plaintiffs' Exhibits Nos. 17 and 45.)

B. *Racial Disparities in Pay Rates Among Male Employees Hired in the Same Year*

62. The following table shows the current average pay rates for black and for white current male hourly employees who were hired in the same years from 1960 to October 1, 1972:

Year Of Hire	Current Average Black Male Pay Rate	Current Average White Male Pay Rate	Current Hourly Difference In Cents	Current Annual Difference
1960	2.42	2.91	48.7¢	$1,013.83
1961	2.42	2.83	41.4¢	860.95
1962	2.54	2.79	25.9¢	538.48
1963	2.47	2.77	30.1¢	625.76
1964	2.47	2.68	20.4¢	424.26
1965	2.38	2.73	35.0¢	728.69
1966	2.42	2.77	35.5¢	738.89
1967	2.36	2.61	25.2¢	524.44
1968	2.28	2.64	35.7¢	743.04
1969	2.31	2.70	38.7¢	804.60
1970	2.36	2.62	25.6¢	532.52
1971	2.32	2.49	17.0¢	353.80
1972 (through October 1)	2.28	2.45	17.3¢	360.67

(Plaintiffs' Exhibit Nos. 13 and 30.)

C. *Racial Disparities in Pay Rates Among Male Employees With the Same Kinds of Previous Employment Experience*

63. The following table shows the current average pay rates for black and for white current male hourly employees who have the same kinds of previous employment experience:

Type Of Previous Experience	Current Average Black Male Pay Rate	Current Average White Male Pay Rate	Current Hourly Difference In Cents	Current Annual Difference
Information Not Available	$2.32	$2.67	35.2¢	$732.02
Previous Textile Experience (Not J.P. Stevens)	2.38	2.81	43.4¢	902.95
Previously Employed by J.P. Stevens	2.34	2.64	29.9¢	621.38
Previous Mechanical Experience	2.47	2.76	28.9¢	601.88
No Previous Experience	2.34	2.66	32.8¢	681.53
Experience Unrelated To Textile Work	2.32	2.66	33.7¢	700.22

(Plaintiffs' Exhibits Nos. 11 and 31.)

64. For current male hourly employees with each type of previous employment experience listed above, the following table shows the percentage of black males, and the percentage of white males, who are currently making $2.20 an hour or less:

Bottom of the Pay Scale

Types of Previous Experience	Number of Black Males With This Experience	Number Making $2.20 An Hour Or Less	Per Cent Making $2.20 An Hour Or Less	Number of White Males With This Experience	Number Making $2.20 An Hour Or Less	Per Cent Making $2.20 An Hour Or Less
Information Not Available	84	24	33.3%	185	22	11.9%
Previous Textile Experience of Any Kind	91	28	30.8%	256	28	10.9%
Previous Mechanical Experience	16	5	31.3%	57	5	8.8%
No Previous Experience	48	14	29.2%	52	2	3.8%
Experience Unrelated To Textile Work	540	196	36.3%	601	62	10.3%

(Plaintiffs' Exhibit Nos. 18, 46 and 52.)

65. For current male hourly employees with each type of previous employment experience listed above, the following table shows the percentage of black males, and the percentage of white males, who are currently making $2.51 an hour or more:

Top of the Pay Scale

Types of Previous Experience	Number of Black Males With This Experience	Number Making $2.51 An Hour Or More	Per Cent Making $2.51 An Hour Or More	Number of White Males With This Experience	Number Making $2.51 An Hour Or More	Per Cent Making $2.51 An Hour Or More
Information Not Available	84	14	16.7%	185	122	65.9%
Previous Textile Experience of Any Kind	91	23	25.3%	256	153	59.8%
Previous Mechanical Experience	16	6	37.5%	57	38	66.7%
No Previous Experience	48	11	22.9%	52	29	55.8%
Experience Unrelated To Textile Work	540	116	21.5%	601	340	56.6%

(Plaintiffs' Exhibits Nos. 18, 46 and 52).

D. *Racial Disparities in Pay Rates Among Male Employees With the Same Levels of Education*

66. Of those current male hourly employees for whom educational information was available, 38.1% of the blacks, and only 28.6% of the whites, had completed the twelfth grade or more. The average black male had completed 9.6 years of education, and the average white male had completed 8.9 years of education (Plaintiffs' Exhibits Nos. 8 and 51).

67. The following table shows the current average pay rates for black and for white current male hourly employees with the same levels of education:

Years of Education Completed	Current Average Pay Rate For Black Males With This Level Of Education	Current Average Pay Rate For White Males With This Level Of Education	Current Average Hourly Difference In Cents	Current Average Annual Difference
3	2.16	2.57	41.4¢	$860.34
4	2.21	2.63	42.1¢	876.17
5	2.26	2.71	45.2¢	940.27
6	2.24	2.65	40.6¢	844.80
7	2.29	2.72	43.1¢	895.80
8	2.38	2.71	33.4¢	694.59
9	2.29	2.71	42.7¢	887.69
10	2.37	2.75	37.2¢	774.26
11	2.32	2.67	34.8¢	723.29
12	2.38	2.64	25.4¢	528.89

(Plaintiffs' Exhibits Nos. 8 and 40.)

68. For current male hourly employees, the following table shows the percentage of black males, and the percentage of white males, at each level of education who are currently making $2.20 and hour or less:

Bottom of the Pay Scale

Years Of Education Completed	Number Of Black Males With This Level Of Education	Number Making $2.20 An Hour Or Less	Per Cent Making $2.20 An Hour Or Less	Number of White Males With This Level Of Education	Number Making $2.20 An Hour Or Less	Per Cent Making $2.20 An Hour Or Less
1 or 2	4	3	75.0%	14	5	35.7%
3	20	14	70.0%	32	4	12.5%
4	23	13	56.5%	38	7	18.4%
5	27	13	48.1%	33	3	9.1%
6	27	12	44.4%	78	9	11.5%
7	55	24	43.6%	74	12	16.2%
8	54	13	24.1%	106	11	10.4%
9	61	27	44.3%	105	8	7.6%
10	79	23	29.1%	101	6	5.9%
11	76	26	34.2%	65	7	10.8%
12	256	67	26.2%	239	19	7.9%
13 or more	6	0	0%	20	0	0%

(Plaintiffs' Exhibits Nos. 21 and 49.)

69. For current male hourly employees, the following table shows the percentage of black males, and the percentage of white males, at each level of education who are currently making $2.41 an hour or more:

Top of the Pay Scale

Years Of Education Completed	Number Of Black Males With This Level Of Education	Number Making $2.41 An Hour Or More	Per Cent Making $2.41 An Hour Or More	Number Of White Males With This Level Of Education	Number Making $2.41 An Hour Or More	Per Cent Making $2.41 An Hour Or More
1 or 2	4	0	0%	14	1	7.1%
3	20	1	5.0%	32	21	65.6%
4	23	1	4.3%	38	26	68.4%
5	27	4	14.8%	33	27	81.8%
6	27	4	14.8%	78	57	73.1%
7	55	13	23.6%	74	53	71.6%
8	54	19	35.2%	106	79	74.5%
9	61	15	24.6%	105	82	78.1%
10	79	33	41.8%	101	77	76.2%
11	76	23	30.3%	65	49	75.4%
12	256	120	46.9%	239	175	73.2%
13 or more	6	0	0%	20	11	55.0%

(Plaintiffs' Exhibits Nos. 21 and 49.)

70. From the foregoing the following factual conclusions emerge:

(a) The average black male hourly employee is presently paid substantially less per hour than the average white male hourly employee. This has been true at the close of each year from 1967 through 1971, and the differences have generally been getting larger.

(b) These differences are not explained by differences in the periods of time that employees have worked for Stevens. Among current male hourly employees hired in the same year, blacks are paid substantially less per hour than whites.

(c) These differences are not explained by differences in the previous experience of the employees working for Stevens. Among current male hourly employees with the same kinds of previous experience, blacks are paid substantially less per hour than whites.

(d) These differences are not explained by differences in the levels of education of the employees working for Stevens. Among current male hourly employees, blacks have more years of schooling than whites and blacks with a given grade level of education are paid substantially less per hour than whites with the same grade level of education.

VIII. *Discrimination in the Assignment of Newly-Hired Black Males to Lower-Paying Departments*

71. Different departments have in them different kinds of jobs, with different rates of pay. In some departments, such as warehouse departments, the majority of jobs are low-paid. In others, such as weaving departments, there are a substantial number of highly-paid jobs. Different departments will have different average rates of pay (Tr. 535).

72. Because of the limited opportunities for employees to learn of job openings, an employee's opportunities for a good paying job are limited to those good paying jobs, if any, that exist within the department to which the employee is originally assigned (Tr. 536-537).

73. The following table includes information for all departments with ten or more current hourly male employees hired on or after January 1, 1969. This table shows the patterns of initial assignments, by race, to different departments up until October 1, 1972:

Departments With The Following Average Hourly Rates of Pay	Total Males Working In These Departments Who Were Hired On Or After January 1, 1969	Black Males So Hired	Per Cent of These Total Males Who Are Black
$2.70 or more	183	66	36.1%
2.60 to 2.69	26	10	38.5%
2.50 to 2.59	71	53	74.6%
2.40 to 2.49	162	104	64.2%
2.30 to 2.39	156	104	66.7%
2.29 or less	124	99	79.8%

(Plaintiffs' Exhibits Nos. 20 and 91.)

74. An employee who changes departments loses the departmental seniority acquired in his old department and thus runs a greater risk of layoff by transferring than he or she would run by remaining in his or her old department. This employment practice or policy has the effect of discouraging transfers between departments.

75. Because the possibility of transfers between departments is limited to the "grapevine" network previously referred to, because this network is conducive to discrimination, and because Stevens' present policies subject an employee transferring departments to a greater risk of layoff, a black male discriminatorily assigned to a low-paid department will likely suffer reduced opportunities for a

good-paying job long after the original discriminatory departmental assignment. When such a black male transfers to a department with better-paying jobs, he will be far more vulnerable to lay-offs than white males hired after he was, but originally assigned to that higher-paying department. This is a continuing effect of the prior discriminatory departmental assignment.

76. At least some of the racial discrimination against black males in present job assignments is the result of the racial discrimination against black males in initial assignment to various departments.

IX. *Discrimination in Job Assignments of Female Hourly Employees*

77. Unlike the findings for male employees, the comparison of average hourly pay rates for current hourly female employees show few substantial differences between black females and white females. The differences shown are generally statistically insignificant. This is true for the comparison of average current pay rates (Plaintiffs' Exhibit No. 29), average pay rates in previous years (Plaintiffs' Exhibit No. 42), average current pay rates for female employees with the same kinds of previous experience (Plaintiffs' Exhibit No. 31), average current pay rates for female employees hired in the same years (Plaintiffs' Exhibit No. 30), and average current pay rates for female employees who have completed the same number of years of education (Plaintiffs' Exhibit No. 40).

78. As of October 1, 1972, for current hourly employees, 13.1% of black females—and 23.8% of white females—earned $2.51 an hour or more (Plaintiffs' Exhibit No. 17; Plaintiffs' Exhibit No. 45).

79. For current female hourly employees with each type of previous experience listed below, the following table shows the percentage of black females, and the percentage

of white females, with each type of experience, who are currently making $2.51 an hour or more:

Top of the Pay Scale

Type of Previous Experience	Number Of Black Females With This Experience	Number Making $2.51 An Hour Or More	Per Cent Making $2.51 An Hour Or More	Number of White Females With This Experience	Number Making $2.51 An Hour Or More	Per Cent Making $2.51 An Hour Or More
Information Not Available	36	7	19.4%	130	42	32.3%
Previous Textile Experience Of Any Kind	55	9	16.4%	437	123	28.1%
Previous Clerical Experience	15	1	6.7%	34	6	17.6%
Previous Supervisory Experience	4	0	0%	6	1	16.7%
No Previous Experience	142	15	10.6%	164	17	10.4%
Experience Unrelated To Textile Work	205	27	13.2%	289	64	22.1%

(Plaintiffs' Exhibits Nos. 18 and 46.)

80. For current female hourly employees with the levels of education listed below, the following table shows the percentage of black females, and the percentage of white females, with each level of education who are currently making $2.51 an hour or more:

Top of the Pay Scale

Years Of Education Completed	Number Of Black Females With This Level Of Education	Number Making $2.51 An Hour Or More	Per Cent Making $2.51 An Hour Or More	Number Of White Females With This Level Of Education	Number Making $2.51 An Hour Or More	Per Cent Making $2.51 An Hour Or More
7 or less	11	1	9.1%	178	41	23.0%
8	25	5	20.0%	104	26	25.0%
9	47	9	19.1%	114	28	24.6%
10	55	7	12.7%	134	28	20.9%
11	60	9	15.0%	110	31	28.2%
12	238	25	10.5%	261	62	23.8%
13 or more	7	1	14.3%	9	3	33.3%

(Plaintiffs' Exhibits Nos. 21, 22 and 49.) With the exception of female employees with eight years of education, a substantially greater proportion of white than of black females in each of these categories are currently earning $2.51 an hour or more.

81. From the foregoing it is apparent and the court so finds there are differences in the distribution of pay rates between black females and white females—essentially, differences in the proportions of black and of white women in Stevens' highest-paying jobs for women—that are concealed by the similarity of their average pay rates.

82. Better job opportunities opened up for black women between mid-May, 1969 and the time of the trial. For example:

(a) In mid-May of 1969, only 4 of Stevens' 209 female weavers (1.9%) were black (Plaintiffs' Exhibit No. 58). From this date until June 30, 1972, however, Stevens hired and initially assigned 116 females to the jobs of weaver or weaver learner. Forty of them (34.5%) were black. The job of weaver currently pays $2.74 an hour (Defendant's Exhibit No. 4).

(b) In mid-May of 1969, only 6 of Stevens' 120 female spinners (5.0%) were black (Plaintiffs' Exhibit No. 58). From this date until June 30, 1972, however, Stevens hired and initially assigned 45 females to the jobs of spinner or spinner learner. Twenty-two of them (48.9%) were black (Plaintiffs' Exhibit Nos. 105 and 92). The job of spinner currently pays $2.45 an hour (Defendant's Exhibit No. 4).

(c) In mid-May of 1969, none of Stevens' 62 female battery fillers and magazine fillers (0%) were black. There were no male battery or magazine fillers (Plaintiffs' Exhibit No. 58). From this date until June 30, 1972, Stevens hired and initially assigned 34 females to the jobs of battery filler or magazine filler. Five of them (14.7%) were black (Plaintiffs' Exhibit Nos. 92 and 105). The jobs of battery filler and of magazine filler currently pay $2.35 an hour.

(d) In mid-May of 1969, only 7 of Stevens' 135 female inspectors, and re-inspectors of all kinds (5.2%) were black. (Plaintiffs' Exhibit No. 58.) From this date until June 30, 1972, Stevens hired and initially assigned 178 females to the jobs of inspectors or re-inspectors of any kind. Thirty-five of them (19.7%) were black (Plaintiffs' Exhibit Nos. 105 and 92). Inspecting and re-inspecting jobs have various current hourly pay rates: $2.45 (card cutting inspector), $2.37 (inspector-re-inspector, damask inspector, terry inspector), $2.27 (cloth inspector-re-inspector), $2.23 (sample inspector), and $2.22 (cloth inspector) (Defendant's Exhibit No. 4).

X. *Discrimination in Layoffs and Recalls*

83. Layoffs are governed by departmental seniority. When there is a layoff in a job category, the employee in that job category with the lowest amount of departmental seniority will be laid off first, even if he or she is better qualified and performs his or her job better than employees in that job category who have more departmental seniority (Tr. 513-515). Recalls are also made on the basis of depart-

mental seniority, regardless of differences in qualifications or ability (Tr. 538-539).

84. Departmental seniority is also used to govern shift changes (Tr. 539). There are a number of individual exceptions but, generally, employees with the greatest amount of departmental seniority would be found on the first shift (Tr. 540-541). Generally, there is a smaller percentage of blacks among male employees on the first shift than there is on the second and third shifts. There is a substantially smaller percentage of blacks among female employees on the first shift than there is on the second and third shifts (Plaintiffs' Exhibit No. 53). Black males generally have less departmental seniority than white males (Tr. 542).

85. Departmental seniority covers only the amount of time an employee has worked in a given department, and excludes any time previously worked in other departments (Tr. 512-513).

86. A substantial number of black males have been assigned to departments where there are few good-paying jobs, and a substantial number of white males have been assigned to departments where there are many good paying jobs. When such a black male transfers to a department with many good-paying jobs, Stevens' layoff policy will result in his being far more vulnerable to layoffs than a white male hired after he was, but originally assigned to that department.

87. Stevens' policy of using departmental seniority to govern layoffs and recalls substantially disadvantages black employees and gives continuing effect to the discriminatory departmental assignments of male employees, as well as to the discriminatory hiring practices against both black males and black females.

88. Stevens has rehired a number of persons whom it had previously fired; it has rehired a number of persons whose former supervisors had recommended against re-

employing them on the same job; it has rehired a number of persons whose former supervisors had recommended against considering them for other jobs; it has rehired a number of persons whose attendance and work records were poor.

XI. *Discrimination in Waiting Periods Before Hire for Black Females*

89. When black females are hired, they have likely had to wait longer from the date of their first application to the date of their hire.

90. Among female employees hired during 1972 for whom applications forms had been retained in their personnel folders, the average time from the date of first application to the date of hire was 83.57 days for black females and 49.16 days for white females (Tr. 748-782; Plaintiffs' Exhibit No. 130).

XII. *Defendant's Evidence and Defenses*

91. Stevens and its predecessor owners of the Roanoke Rapids plants have never barred nor refused employment to blacks, but in the earlier years of the operation of the plants blacks living in the area were engaged primarily in farming and they lacked the qualifications and skills required by technical jobs in the mills. Consequently they did not apply for and obtain these jobs in large numbers (Tr. 666-667).

92. During ten or more years prior to the trial of this action the area around Roanoke Rapids which had for years been predominantly agricultural was undergoing a transition to a more industrialized economy. Increased mechanization of farming operations was displacing farm laborers in substantial numbers and these people of both races, most of whom were without industrial skills, began to seek employment in the mills and factories. The result

was an oversupply of unskilled labor and consequent unemployment. During this period many applicants of both races were unsuccessful in obtaining employment with Stevens (Tr. 853-860).

93. From 1967 to 1972 the number of black employees at Stevens grew from 533 to 1,271 while the number of white employees dropped from 2,809 to 2,499. During this period the percentage of blacks in the total labor force rose from 15.9% to 33.7% while the percentage of whites dropped from 84.1% to 66.3% (Defendant's Exhibit No. 1). This is attributable, at least in part, to the fact that more whites are now seeking employment in occupations with higher pay scales than the textile mills (Tr. 668). But there is still a much larger number of applicants, black and white, than there are jobs to be filled (Tr. 677).

94. In defendant's Roanoke Fabricating Plant the number of black employees increased from 28.9% to 50.2% of the total between 1967 and 1972 (Tr. 628).

95. Of the thirty-five new employees hired by Stevens in its Central Service and Administrative Departments between 1967 and 1972, ten were college graduates and twelve had had previous experience with the company (Tr. 654-657).

96. Plaintiffs' evidence shows that a number of black female applicants for employment with Stevens had had previous schooling and experience in clerical work which would seem to qualify them for clerical positions with Stevens. Twenty-nine of these applicants submitted their applications on forms designed for use in making application for employment in the production plants rather than in the clerical force. The application blanks for these twenty-nine persons were identified as Plaintiffs' Exhibit No. 96 (Tr. 323) and introduced in evidence as one exhibit (Tr. 340). The forms contained the question, "What type of textile work are you best qualified to do?" In most instances this question was left blank, but occasionally an applicant

would insert in the blank "general office work", "typing, filing", "clerical", and "typing", but more frequently the question was answered with words like "folding or packing", "in the fabricating room", "office work and waitress", "sewing", "assembly or packing and machine", and in almost every instance there was an indication of the choice of shifts on which the applicant desired to work. From this and other information contained on these twenty-nine application blanks the court is unable to conclude that these applicants were actively seeking employment in the defendant's clerical department, and the claim of the plaintiffs that these individuals were denied employment in the clerical department on account of race is not sustained.

97. During the period 1967-1972 blacks were promoted in larger percentages than whites in four of defendant's plants and in lesser percentages in two of its plants (Defendant's Exhibit No. 5). A considerable number of employees of each race who are offered promotions do not accept them (Tr. 661).

98. From a practical standpoint an employer such as Stevens cannot maintain in each of its job classifications the same ratio of black to white employees as it maintains in the plant as a whole. Any attempt to do so would result in discrimination against one or other of the two races (Tr. 680).

99. Stevens has paid blacks and whites the same rate of pay for performing the same jobs, and plaintiffs do not contend to the contrary (Tr. 188, 456, 674).

100. No employee has been discharged by Stevens on account of race (Tr. 5).

101. The testing system employed by Stevens is not racially discriminatory (Tr. 11).

102. The seniority system in effect has not operated to deprive blacks of promotion opportunities (Tr. 4).

103. The records of Stevens do not indicate the race of its employees (Tr. 674).

104. The management of Stevens has not consciously or knowingly engaged in discriminatory employment practices, and there is no evidence of any specific overt employment practice which has operated to deprive blacks of equal employment opportunities (Tr. 948).

Conclusions Of Law

1. The court has jurisdiction of the action under the Civil Rights Act of 1866, 42 U.S.C. § 1981, and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Section 1981 provides in substance that all persons shall have the same right to make and enforce contracts as is enjoyed by white citizens. That portion of Title VII pertinent here prohibits discrimination in employment based on race. These statutes are constitutional.

2. Originally construed to apply only to state action, since the Supreme Court's decision in *Jones* v. *Alfred H. Mayer Company,* 392 U.S. 409 (1968), which extended the coverage of Section 2 of the Civil Rights Act of 1866 (now 42 U.S.C. § 1982) to private contractual relationships, the courts have uniformly applied Section 1981 in cases involving alleged discrimination in private employment contracts. Such is the law in this circuit. *Brown* v. *Gaston County Dyeing Machine Company,* 457 F.2d 1377 (4th Cir. 1972), *cert. denied,* 409 U.S. 982.

3. The defendant, J.P. Stevens & Company, Inc., is an employer within the meaning of 42 U.S.C. § 2000e(b), and is engaged in an industry affecting commerce within the meaning of 42 U.S.C. § 2000e(h). It is also subject to the provisions of 42 U.S.C. § 1981.

4. 42 U.S.C. § 2000e-5(g) provides in part as follows:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."

To show that an employer has "intentionally engaged . . . in an unlawful employment practice" requires only a showing that he meant to do what he did, that is, that the practice was not accidental. *Robinson* v. *Lorillard Corporation,* 444 F.2d 791, 796 (4th Cir. 1971). In assessing liability under Section 1981 courts apparently have applied similar standards. *Brown* v. *Gaston County Dyeing Machine Company, supra.*

5. The thirteen named plaintiffs listed in Finding of Fact No. 1 have failed to prove their individual claims of employment discrimination, and an order will be entered dismissing the action as it relates to them.

6. An apparent anomaly in practice and procedure in employment discrimination class actions is that dismissal or mootness of the claims of the individual plaintiffs will not operate as a dismissal or render moot the action of the class or destroy the right of the individual plaintiffs to litigate the issues on behalf of the class. *Brown* v. *Gaston County Dyeing Machine Company, supra; Moss* v. *Lane Company, Incorporated,* 471 F.2d 853 (4th Cir. 1973). This case must therefore proceed to final judgment as to the members of the class on whose behalf it has been prosecuted notwithstanding the dismissal of the claims of all the named plaintiffs. Except with respect to the grounds upon which their respective individual claims were dismissed the dismissals are without prejudice to the rights of the individual plaintiffs to establish their membership in any class for which relief may be granted on other

grounds. *Bennett* v. *Gravelle*, 323 F.Supp. 203 (D.Md. 1971), *aff'd*, 451 F.2d 1011 (4th Cir. 1971), *cert. denied*, 407 U.S. 917 (1972).

7. By order dated June 17, 1971, the action was allowed to proceed as a class action and the class was preliminarily designated to include all Negroes then employed at all the Roanoke Rapids, North Carolina plants of J.P. Stevens & Company, Inc., and all Negroes who might thereafter apply for or be employed at said plants who might be affected by the alleged racially discriminatory employment practices of the defendant. By order dated September 29, 1972, the class was re-defined and enlarged to include:

> (a) All Negroes employed at all the Roanoke Rapids plants of J.P. Stevens & Company, Inc., on and after October 2, 1967; and
>
> (b) All Negroes who have applied for employment at said Roanoke Rapids plants since October 2, 1967, who claim to have been affected by the alleged racially discriminatory employment practices of the defendant.

The re-designation of the class by the order of September 29, 1972 is now reconfirmed.

8. While the plaintiffs have not offered evidence of any specific, overt racially discriminatory employment practices of the defendant, the plaintiffs have by statistical evidence and evidence of seemingly neutral practices established a prima facie case of acts and omissions of the defendant violative of the provisions of Title VII and Section 1981. More specifically, plaintiffs have established racial discrimination in defendant's employment practices in these respects:

(a) Defendant's policy of relying almost exclusively upon subjective conclusions of its all-white overseers and

personnel officials in hiring and promotion is discriminatory.

(b) Defendant's failure to establish objective, formal guidelines for hiring, promotion and transfer and for giving notices of vacancies within its plants except by word of mouth is discriminatory. *Brown* v. *Gaston County Dyeing Machine Company, supra.*

> "Nonobjective hiring standards are always suspect because of their capacity for masking racial bias." *Barnett* v. *W.T. Grant Company*, 518 F.2d 543, 550 (4th Cir. 1975).

(c) Although qualifications play a minor role in the defendant's hiring process and there is no evidence to show that blacks do more poorly than whites on the rudimentary pre-employment tests administered by defendant, the statistics establish that a substantially higher percentage of white applicants for employment than black applicants are successful in getting jobs (Findings of Fact 25-31).

(d) The defendant has reserved its clerical jobs and substantially all of its supervisory jobs for whites (Findings 32-43).

(e) The jobs of weaver and fixer which are relatively high-paying jobs were reserved almost exclusively for whites prior to May of 1969, and discrimination against black males in these jobs has continued (Findings 44-54).

(f) The defendant has reserved the comparatively low-paying job of warehouseman for blacks (Findings 55-59).

(g) The average black male hourly employee of defendant is paid substantially less per hour than the average white male hourly employee and the differences have generally been getting larger in the period between 1967 and the time of the trial (Findings 60-70).

(h) Newly-hired black males are assigned more frequently than whites to lower-paying departments (Findings 71-76).

(i) Defendant's departmental seniority system is discriminatory in that an employee who changes departments loses his departmental seniority in his old department and thus runs a greater risk of lay-off by transferring than he would by remaining in his old department. This discourages transfers between departments, and a black male discriminatorily assigned to a low-paid department suffers reduced opportunities for a good paying job after his original discriminatory departmental assignment (Findings 71-76).

(j) Black female hourly employees are discriminated against in their original job assignments (Findings 77-82).

(k) Blacks are discriminated against in lay-offs and recalls (Findings 83-88).

(l) Black females are discriminated against in having to wait longer than white employees from the date of their first application to the date of their hire (Findings 89, 90).

9. The defendant has failed to carry its burden of rebutting the prima facie case of discrimination thus made by the plaintiffs' evidence. More specifically:

(a) The fact that defendant and its predecessor owners of the Roanoke Rapids plants have never barred nor refused employment to blacks is not a defense to the action.

(b) The fact that many applicants of both races are unsuccessful in obtaining employment with defendant is not a defense to the action.

(c) The fact that the percentage of blacks in defendant's total labor force is steadily rising is not a defense to the action, for this fact must be considered in the light of the fact that the number of black applicants for employment far exceeds the number of white applicants, and the percentage of successful white applicants continues to exceed the percentage of successful black applicants.

(d)The facts that defendant has discharged no employee on account of race; that its testing system is not racially discriminatory; that its seniority system has not operated to deprive blacks of promotion opportunities; and that its records do not indicate the race of its employees are not defenses to this action.

(e) The defendant has not shown a business necessity as justification for any of the discriminatory employment practices.

(f) The fact that defendant has acted in good faith is not a defense to the action. *Albemarle Paper Company* v. *Moody*, U.S. , 95 S.Ct. 2362 (1975); *Barnett* v. *W.T. Grant Company, supra; Brown* v. *Gaston County Dyeing Machine Company, supra.*

> "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.
>
> * * * * * * * * * * * * * * * * *
>
> "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Griggs* v. *Duke Power Company*, 401 U.S. 424, 430 (1971).

10. The defendant having failed to rebut the plaintiffs' prima facie case, the conclusion follows that the defendant has intentionally engaged in unlawful employment practices as found herein and is therefore in violation of the provisions of 42 U.S.C. § 1981 and Title VII of the Civil

Rights Act of 1964, and the plaintiff class is therefore entitled to relief which will include the following:

(a) All racially discriminatory employment acts, omissions and practices as herein found will be enjoined.

(b) Back pay will be awarded to members of the class on conditions to be prescribed later by the court.

(c) The plaintiffs will be awarded reasonable attorney's fees and costs.[1]

11. With respect to the back pay award the North Carolina three-year statute of limitations, G.S. 1-52, governs the action under each of the statutes, Section 1981 and

[1] The word "intentionally" as used in this conclusion refers only to the fact that defendant meant to do what it was doing and its practices were not accidental (see Conclusion of Law No. 4). It is not suggested that defendant intended to violate the law, for there is no evidence of such. Except as to such facially neutral practices as its seniority rules, word-of-mouth hiring, etc., there is in fact no readily apparent means the defendant could have adopted, consistent with good business practice, to avoid these consequences. Given the force and effect which must be accorded statistical evidence, *United States* v. *C. & O. Railway Co.*, 471 F.2d 582 (4th Cir. 1971), and the peculiar burden of proof rule applicable to these cases which requires an employer to establish his innocence by "clear and convincing" evidence, *Johnson* v. *Goodyear Tire & Rubber Company*, 491 F.2d 1364, 1380 (5th Cir. 1974), any employer who found himself with a substantial majority/minority disparity in his labor force at the time of Title VII's enactment was headed for trouble unless he chose to practice wholesale "reverse discrimination". And even so, such employers may have liability under Section 1981, at least in this circuit, notwithstanding the demonstrated discriminatory practice offended no known law at the time of its commission, *Brown* v. *Gaston County Dyeing Machine Company*, 457 F.2d 1377 (4th Cir. 1972). And once a violation of Title VII or Section 1981 is established the relief herein awarded must follow as a matter of course, and considerations of the employer's good faith apparently are irrelevant. *Hairston* v. *McLean Trucking Company*, 520 F.2d 226 (4th Cir. 1975).

Title VII, on which it is grounded, and therefore back pay will not be allowed for the period prior to October 2, 1967, which is three years prior to the institution of the action *Johnson* v. *Railway Express Agency,* U.S. , *95 S.Ct. 1716 (1975); Broadnax* v. *Burlington Industries, Inc.,* F.Supp. *(M.D.N.C. 1974); Annot., 21 A.L.R.Fed. 472, 541 § 9(c). See Rios* v. *Enterprise Association*, 400 F.Supp. 988 (S.D.N.Y. 1975).

12. Counsel are directed to confer and undertake to agree upon the form of a decree to be entered on the basis of the foregoing findings and conclusions and any other matters which may properly be the subject of agreement and to submit to the court for signing and entry on or before February 6, 1976, a decree embodying the agreements of counsel failing in which the court will schedule a further hearing for the purpose of formulating the final decree.

/s/ F.T. DuPree, Jr.
F.T. Dupree, Jr.
United States District Judge

December 22, 1975.

APPENDIX I

PLAINTIFFS' PROPOSED FINDINGS OF FACT ADOPTED BY THE COURT—HIRING AND PROMOTION PROCEDURES:

Proposed Finding Number

26. The court credits the testimony of Stevens' personnel director, and finds, that most of the job categories in these plants can be filled by any willing, able-bodied person.

27. For most job categories in these plants, previous experience in that or similar jobs is desirable, but unnecessary. Most new employees are in fact inexperienced, and must be trained to do their jobs.

29. Although Stevens takes education into account in hiring and initial assignment, this is only a general trend and not a requirement. Most of the job categories in these plants can be filled by persons with widely-varying levels of education, and do not require specific minimum levels of education for successful performance in them.

31. Most of the job categories in these plants are "entry level" in that they can be filled by persons hired off the street, and their successful performance does not require previous experience in the same job or department.

33. There are ordinarily many more applicants than there are vacancies to fill. In the first six months of 1972, for example, there were 1,668 male and female applicants. Of these, only 560 were hired.

34. When an application is filed, Stevens ordinarily retains it for six months; after this period, it is no longer considered current. An application can be kept current by revisiting the personnel office.

35. When a vacancy occurs, the personnel office ordinarily selects an applicant to hire from among the most recent applications, rather than checking the current applications to find the most qualified applicant.

38. Stevens has placed a number of job orders with the Roanoke Rapids branch office of the North Carolina Employment Security Commission. In the course of the Commission's duties, this branch office has also on occasion contacted Stevens' personnel office to develop, if possible, a job opportunity for someone who has come to the branch office of the Commission looking for work. With respect to the job of slubber changer trainee, Stevens has entered into an agreement with the National Alliance of Businessmen and the United States Department of Labor whereby the Commission refers disadvantaged persons to Stevens for hiring and training in this job category. This program is called the JOBS Seventy program.

39. Over the Commission's objections, it was ordered to produce its records of such job orders and job development contacts involving Stevens. Virtually all of the job orders and job development contacts indicated that Stevens preferred previous experience, but that it was not necessary for employment. The job categories involved, for which experience was not required, were:

Weaver
Cloth Doffer
Weaver Trainee
Napkin Hemmer
Inspector
Terry Folder
Tenter Frame Operator
Weaver Apprentice
Loom Fixer

Stock Clerk
Slasher Tender Helper
Frequency Checker
Material Handler
Laboratory Tester
Packager
Handler
Cutting Machine
Customer Service Clerk
Frame Changer

40. Each time Stevens placed a job order, and each time a job development contact was made, Stevens was able to inform the Commission of any specific job qualifications it thought advisable. The job orders and job development contacts introduced as Plaintiffs' Exhibit No. 50(a) show spaces for taking down specific job qualifications—"Physical Requirements", "Experience Requirements", "Education and Training Requirements" and "Miscellaneous Requirements". The only entries on these job orders and job development contacts are "Will Train" under the "Experience Requirements" heading. The form used for the JOBS Seventy program, for the job category of slubber changer trainee, states only that the person must pass the company physical, that he or she will receive training, and that he or she must have obstacles to employment, such as being handicapped, or a dropout. No notations as to qualifications, other than those specified above, appear on any of these forms.

41. When a vacancy occurs in a department and the departmental overseer determines that it should be filled by hiring an applicant rather than by promoting or transferring an employee, the overseer ordinarily notifies the personnel office of the vacancy on a personnel requisition form. This form has a space on it to inform the personnel office of any specific

qualifications that are necessary or desirable in filling this vacancy.

42. The deposition of James B. Miller taken by the plaintiffs on September 19, 1972, was received in evidence as Plaintiffs' Exhibit No. 101. In the course of this deposition, a number of personnel folders were examined, including folders for a number of persons in fairly high-paying jobs such as section man and weaver. Most of these folders contained the original personnel requisition forms referring to the vacancy the person filled.

43. In the vast majority of personnel requisition forms for high-paying jobs examined in the course of this deposition, there was, under the heading of "special qualifications needed", either no entry or only a very general entry such as "must be five foot two" or "must have good dexterity".

47. Frequently, the same job categories exist in more than one department of the same plant and exist in more than one plant. There are, for example, four plants having one or more weaving departments, four plants with a spinning department, four plants with a carding department, and four plants with a preparation department.

48. Stevens' personnel manager testified that, where different overseers are filling vacancies in the same job categories in their own departments, it is possible that they would assign different weights to the same factors in reaching their decisions.

59. Most of the persons hired by Stevens are inexperienced in the jobs to which they are assigned, and therefore have to be trained. Most of the applicants for jobs with Stevens have no previous textile experience of any kind.

60. The training is informal, on-the-job training; in some jobs, it consists of other employees spending a few days with a new employee showing him or her how to do the job. The new employee is expected to improve his or her skills during the "training period", a period varying in duration from job to job, and during which an employee makes a lesser rate.

61. There are 1,682 current male hourly employees for whom information about previous employment experience is available from Stevens' records. Of these, only 20.7 per cent had any previous textile experiences of any kind. 73.7 per cent either had no previous employment experience at all, or had previous experience unrelated to textile work.

62. There are 1,357 current female hourly employees for whom information about previous employment experience is available from Stevens' records. Of these, only 36.2 per cent have previous textile experience of any kind, and 59 per cent either had no previous employment experience at all, or had previous experience unrelated to textile work.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

Civil No. 1201

LUCY M. SLEDGE, et al.,
individually and on behalf of all others similarly situated,
Plaintiffs

v.

J.P. STEVENS & CO., INC.,
Defendant

Filed Sept. 10, 1976

ORDER

Under date of April 22, 1976 the plaintiffs requested reconsideration of certain specific rulings previously made by the court. Having again reviewed the record as it relates to the rulings in question, the court now makes the following rulings and it is

ORDERED:

1. The request of the individual plaintiffs for reconsideration of the dismissal of their personal claims is again denied.

2. The court adheres to its previous ruling that the period prior to October 2, 1967 is outside the period of limitations and denies plaintiffs' request for reconsideration of this ruling. The court is advertent to recent developments in this area of the law and its own decision in *Pittman* v. *Anaconda Wire and Cable Company*, F.Supp. , 11 F.E.P. Cases 9 (E.D.N.C. 1974), and the well-reasoned decision of Judge Gordon of the Middle District of North Carolina in *Lattimore* v. *Loews Theatres, Inc.*, No. C-75-

79-G, but the court is persuaded that *Johnson* v. *Railway Express*, 421 U.S. 454 (1975), should be applied retroactively and is controlling as to plaintiffs' claims under 42 U.S.C. § 1981. With respect to plaintiffs' Title VII claims, the court is not persuaded that the filing of the EEOC charges by the plaintiffs tolled the three-year statute of limitations applicable at that time to actions under Title VII. Rather, the court is of opinion that effect should be given to congressional policy as embodied in the 1972 amendments although the amendments are not applicable to this action instituted prior to 1972. *See Equal Employment Opportunity Commission* v. *General Electric Company*, F.2d , 44 L.W. 2358, 12 F.E.P. Cases 21 (4th Cir. 1976).

3. The court declines to reconsider Findings of Fact Nos. 99, 100 and 101.

4. The court clarifies Finding of Fact No. 96 by adding thereto the following:

"This finding is made without prejudice to the rights of any clerically-qualified women to supply in connection with any monetary relief claim any insufficiency of evidence as to whether they were interested in clerical employment."

Finding of Fact No. 102 is rewritten to read as follows:

"Plaintiffs do not claim that the promotional opportunities of Stevens' employees are controlled by seniority."

/s/ F.T.DUPREE, JR.
F.T. Dupree, Jr.
United States District Judge

September 10, 1976.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

Civil No. 1201

LUCY SLEDGE, et al.,
individually and on behalf of all others similarly situated,
Plaintiffs

v.

J.P. STEVENS & CO., INC.,
Defendant

Filed June 25, 1976

DECREE

This action having come on for trial before the court, the issues having been duly tried, findings of fact and conclusions of law having been made pursuant to Rule 52 of the Federal Rules of Civil Procedure, and all issues primarily involving monetary relief, except for the award of the expenses of this litigation through February 20, 1976, having been severed for future disposition, it is hereby

ORDERED, ADJUDGED AND DECREED:

I. *General Provisions*

1. The defendant J.P. Stevens & Co., Inc., and its agents and successors are permanently enjoined from engaging in any act or practice which has the purpose or effect of discrimination against any individual, whether employee or applicant for employment, because of his or

her race, at the following facilities of the defendant in and around Roanoke Rapids, North Carolina:

Delta Finishing Plant No. 4
Patterson Plant
Roanoke Fabricating Plant
Roanoke Plant No. 1
Roanoke Plant No. 2
Roanoke Printing Plant
Roanoke Yarn Dye Plant
Rosemary Greige Plant
Central and Administrative Office
Customer Service Office
Information Services Center

The defendant shall hire, assign, promote, transfer, lay off, recall and rehire persons at these facilities without regard to their race, save for the remedial provisions ordered herein.

2. Nothing in this Decree shall be construed to require the placement of any individual in a job he or she cannot perform with reasonable training by the defendant, or the hiring of any individual who is unfit to work for the defendant, according to objective, racially fair and job-related standards which the defendant has previously filed with the court. The defendant shall provide such reasonable training to as many blacks as may be necessary to insure compliance with Parts II, III and VI of this Decree.

3. (a) As used in this Decree, the phrase "full pay rate" means the highest, post-training hourly rate for jobs paid on a flat hourly basis. For jobs paid on an incentive basis, it means the expected hourly earnings for that job. This phrase excludes shift differentials.

(b) As used in this Decree, the term "job" and phrases such as "job change" do not distinguish between the period in which an employee is in a training period, or receiving a training pay rate, and the post-training period. For

example, "Spinner Learner" and "Spinner" are considered to be the same job for the purposes of this Decree, and it would not be considered a promotion, transfer or job change if a Spinner Learner became a Spinner.

(c) As used in this Decree, the term "reasonable training" shall include the more extensive of (1) the training ordinarily provided by the defendant to a new hire, or to an employee, placed in a job category in which he or she has not previously worked; and (2) the training which the defendant and the union, as a result of the collective bargaining process, agree should be provided to a new hire, or to an employee, placed in a job category in which he or she has not previously worked.

(d) As used in this Decree, the phrase "subclass of present black male employees" shall mean the black males who are current employees of the defendant as of the date of the entry of this Decree, whether or not they are actually working on this date. All black males who have been laid off and still have recall rights as of the date of this Decree, or whose recall rights are restored to them as a result of this Decree, shall, upon recall, be included within this subclass. As used in this Decree, the phrase "subclass of present black female employees" shall mean the same, but with respect to black females.

(e) As used in this Decree, the phrase "bottom of the defendant's pay scale" shall at each point in time mean all hourly or expected pay rates which are equal to, or less than, the sum of $2.20 an hour and the defendant's general increases applicable to this figure from October 1, 1972 until that point in time. The phrase "top of the defendant's pay scale" shall at each point in time mean all hourly or expected pay rates which are equal to, or more than, the sum of $2.51 an hour and the defendant's general increases applicable to this figure from October 1, 1972 until that point in time. These hourly figures were used in the court's findings of fact and conclusions of law.

(f) As used in this Decree, the term "seniority" shall, in the case of each class member who was a victim of previous hiring discrimination and was thereafter hired, or is hereafter hired, by the defendant, mean the seniority that would have accrued if the class member had not been discriminated against in hiring. This seniority shall be indicated by the constructive seniority dates determined in accordance with paragraph 18 below.

4. The court will retain jurisdiction of this case for as long as shall be required to carry out the purposes of this Decree. The obligations of paragraphs 10, 11, 15, 16, 27 and 28 shall cease as soon as the conditions stated therein are met. The reporting requirements which do not state a condition for their termination shall terminate upon the expiration of this court's retention of jurisdiction, unless otherwise ordered upon motion.

II. ***Hiring Provisions***

5. For all applications for jobs other than those clerical jobs specified in paragraph 10, beginning with the calendar quarter next beginning after entry of this Decree, in each calendar quarter, the defendant shall make bona fide offers of employment to the same ratio of black male applicants as of white male applicants, and it shall make bona fide offers of employment to the same ratio of black female applicants as of white female applicants. If, for example, the defendant makes such offers to sixty per cent of the white male applicants and forty-five per cent of the white female applicants in a calendar quarter, it shall make such offers to not less than sixty per cent of the black male applicants and not less than forty-five per cent of the black female applicants in that calendar quarter.

6. The defendant shall post notices, at every place at which it takes applications for employment, stating the name and shift of every job in which there is a vacancy to

be filled by hire, and stating the training pay rate, usual length of training, and full pay rate for every such job.

7. (a) The defendant shall not impose on black female applicants who are eventually hired a longer waiting period before hire than it imposes on white female applicants who are eventually hired.

(b) Applications shall continue to be effective for a minimum of six months.

(c) The defendant shall keep a record of the name, race, sex, and date of application and of each re-application for employment of each person who applies or re-applies after the date of this Decree, and shall, in the event the person is hired, indicate on this record the person's initial plant, department and job assignment and the full pay rate for this job. In the event that this person rejects an offer of employment, the defendant shall indicate on this record the fact of the rejection and the plant, department, job title and full pay rate for the job offered.

III. ***Assignments to Jobs Presently or Formerly Reserved for Persons of One Race***

8. The provisions of paragraphs 21 through 27 apply to this section as well.

9. At any time during which the defendant utilizes an application form for applicants for clerical employment which differs from the application form used for applications for plant jobs, it shall post a notice, at every place at which it takes applications, which clearly states that there are two different kinds of application forms, and that applicants for clerical jobs should obtain and fill out the special form used for clerical jobs.

10. Vacancies in the following jobs shall be filled, subject to availability, on an alternating basis, with at least one black placed for each white so placed in the plant or

office in question, until forty per cent of the employees in those jobs in that particular plant or office are black. This percentage figure is taken from plaintiffs' Exhibit 63, which shows that blacks constituted 41.9% of the clerically-qualified applicants for employment referrals at the Roanoke Rapids office of the North Carolina Employment Security Commission. The jobs are:

(a) Clerical jobs in the Central Office;
(b) Clerical jobs in the Customer Service Office;
(c) Clerical jobs in the Information Services Center;
(d) Clerical jobs in the defendant's other facilities identified in paragraph 1.

11. All facilities which are mentioned in paragraphs 10(a) through 10(d), after meeting the requirements of paragraph 10, shall thereafter for a period of two years together make bona fide offers of employment to the same ratio of black applicants for the jobs mentioned in paragraph 10 as of white applicants for such jobs.

12. The defendant shall examine the application forms of the black applicants listed on plaintiffs' Exhibits 65, 69, 77, 78, 96 and 99, shall examine the application forms of applicants known to be black who are not listed on these exhibits, shall examine the application forms of members of both subclasses of present black employees, and shall compile a list of all of these applicants and employees whose application forms or accompanying documents indicate that they were interested in clerical jobs or that they have clerical skills, and it shall in writing invite them to apply for clerical jobs which may come open in the future.

13. Nothwithstanding the provision of paragraph 7(b), each response to the invitations described in paragraph 12 shall be considered an active application until such time as the person responding has been given a bona fide offer of employment in a clerical job, or has expressly stated in

writing that he or she is no longer interested in clerical employment, or until the person has been rejected for every type of clerical job in use by the defendant, according to objective, racially-fair and job-related standards which the defendant has previously filed with the court. Each such rejected black clerical applicant shall be informed in writing of the reasons for his or her rejection.

14. If the relief in paragraphs 10 and 11 cannot otherwise be achieved from current applications, the defendant shall to the extent necessary implement affirmative recruitment efforts to attract black applicants.

15. Vacancies in weaving jobs shall be filled, subject to availability, on an alternating basis in each plant, with at least one black placed for each white so placed, until forty per cent of the total weaving jobs held by males are held by blacks. This percentage figure is taken from Finding 46 in the court's decision, which found that when the defendant ended its discrimination against black women in making initial assignments of women to weaving jobs, 39.4% of the women so placed were black.

16. For the jobs specified in this paragraph, the defendant shall institute an affirmative action program which shall be maintained until the number of blacks placed in such jobs shall equal one-third of the total of such jobs in defendant's Roanoke Rapids operations. Such affirmative action program shall supplement training programs which affirmative recruitment programs. Such affirmative action program shall be formulated in writing and filed with the court within thirty days of the entry of this Decree. Additionally, records of actions taken under the affirmative action program shall be maintained and shall be furnished to the court within fifteen working days following the close of a calendar quarter, beginning with the next beginning calendar quarter after entry of this Decree.

The provisions of this paragraph shall not require the placement of any unqualified employee; however, no va-

cancy in the enumerated jobs shall be filled until affirmative efforts have been made to place a qualified black employee in such vacancy. Qualifications shall be objective, job-related and racially neutral. The jobs subject of this paragraph are:

(a) Foreman and Forelady jobs in each plant and in each office;
(b) Assistant Overseer jobs in each plant;
(c) Fixer and Fixer Trainee (or similarly entitled) jobs in each plant;
(d) Overseer jobs in each plant.

17. The defendant shall take no action departing from its ordinary practices which would have the purpose or effect of diminishing any part of the relief ordered in this Decree without providing notice thereof and obtaining the advance approval of the court. The prohibition of this paragraph includes, but is not limited to, arranging to have done elsewhere or by temporary employees any substantial part of the clerical work heretofore performed in and around Roanoke Rapids or reducing the number of Weaver and Weaver Learner jobs filled by males.

IV. *Seniority Provisions*

18. (a) Counsel for plaintiffs shall direct the compilation of a constructive seniority list of all present black employees, and shall state for each such employee his or her name, sex, date of hire and date of first recorded application for employment with the defendant. To this end, plaintiffs' counsel and persons under his supervision shall be given access to all application forms and to the personnel folder of each present black employee, and allowed to examine all of its contents. His or her presumptive constructive seniority date shall be computed by determining the average waiting period for white applicants during his or her application year and adjusting his or her application date by

such waiting period. The defendant may for any reason it deems sufficient contest this presumption. If it does so, it shall provide a short, plain statement of its reasons for contending that the employee would not have been hired then and would have been hired later, absent discrimination, and of the facts supporting such reasons. It shall state therein its proposed alternative constructive seniority date and the reasons and facts supporting such a date. Copies of the list and of the defendant's statement shall be sent to counsel for all parties.

(b) If because of other provisions of this Decree a future black employee is hired in such manner that the employment records of defendant would not reflect an employee's possible other employment after his or her last application for employment with defendant, defendant shall in that event have the right to supplement its information prior to responding to the presumptive constructive seniority date.

(c) Counsel shall confer and attempt to agree on the wording of a letter, and of the form to be enclosed therewith, to be given to all present black employees, and given upon completion of their probationary period to all future black employees. Failing agreement of counsel, each party shall then submit a proposed letter and the court shall then decide upon its final form. In any event, no letter, by agreement or otherwise, shall be sent class members without prior submission to and approval of the court. The letter shall explain the purposes of a constructive seniority date, shall state the date of his or her first recorded application for employment with the defendant, shall state his or her constructive seniority date and the method of its calculation, shall inform the employee of any contest by the defendant to his or her presumptive constructive seniority date and of its factual basis, shall briefly advise the employee of the benefit of a presumption in proving a claim, and shall advise the employee of his or her options which can be exercised by filling out the enclosed form and

sending it to counsel for plaintiffs within thirty days after receipt. The options are:

(1) to assert his or her right to the presumptive constructive seniority date as calculated;

(2) to seek an earlier constructive seniority date;

(3) to accept the defendant's proposed alternative constructive seniority date, if any; or

(4) to waive any claim to increased seniority.

The letter shall state that failure to present a claim for constructive seniority shall constitute a waiver of any constructive seniority claim under this Decree. An employee may be relieved from a waiver by a showing of good cause or excusable delay. The letter shall state that counsel for plaintiffs shall be available to answer inquiries at designated times and places. The enclosed form shall request the employee to state his or her proposed constructive seniority date as closely as he or she can, shall request the employee to state as much detail as possible about that application and, if the employee rejects the defendant's proposed date, the form shall request that he or she set forth any facts he or she may have available in response to the defendant's factual contentions.

(d) Counsel for plaintiffs shall seek to obtain as many agreements as possible as to constructive seniority dates, but shall not have the right to compromise, without specific consent, the constructive seniority date of any black employee who has submitted the above-described form.

(e) Any remaining disputes as to each employee's constructive seniority date shall be resolved by the Special Master appointed purusant to paragraph 38.

(f) Constructive seniority shall be used for all purposes for which seniority is now used or may hereafter be used, including all competitive uses of seniority and all uses of seniority to determine entitlements to benefits. Construc-

tive seniority shall be used for all uses of seniority which may be set forth in a collective bargaining agreement between the defendant and the union. Constructive seniority shall be used for the purposes of paragraphs 19, 20, 21, 24, 26, 32 and 33 of this Decree.

19. The defendant shall continue to use company seniority for the purposes of vacations, vacation pay, profit-sharing benefits and coverages and group insurance benefits and coverages. The defendant shall not use job or department seniority for any purpose whatsoever for members of either subclass of present black employees.

20. In determining plant seniority, no present black employee shall be penalized for any transfer that may have resulted in a loss of departmental seniority. Each present black employee who has been laid off and has not been recalled shall have his or her recall rights extended to one year after the date he or she would have been laid off, if lay-offs had been made in accordance with plant seniority. If such a person's recall rights have already expired as of the date of the entry of this Decree, the extension shall take effect as of the date of the entry of this Decree. Otherwise, extensions shall be added to the present recall rights of such employees.

21. The defendant shall use plant seniority for members of either subclass of present black employees for all purposes for which department seniority has heretofore been used, including but not limited to promotions, shift assignments and transfers, and lay-offs and recalls.

V. *Job Posting, Training, Bidding and Red-Circling Provisions*

22. For every plant or office listed in paragraph 1 the defendant shall post in each plant or office at a central location notices stating the name, shift and department of every job, up to and including the job of General Overseer of a department, in which there is a vacancy or opening in

that plant or office. Such notices shall state the training pay rate, length of training, and full pay rate for every job listed. Each such notice shall clearly state that no employee who changes jobs or departments shall lose seniority because of such a change, and that no change subject to paragraph 27 shall result in a loss of pay. The vacancy or opening may be filled on a temporary basis for a maximum of ten working days, but shall not be filled on a permanent basis until the notice has been posted for three full working days. There shall be posted at each bulletin board a notice stating at what central location in the plant job vacancy notices are to be posted. Realignment of employees by shift to meet a vacancy shall be considered filling a vacancy.

23. Within sixty days after entry of this Decree, the defendant shall prepare brief job descriptions for all job categories in each plant and office listed in paragraph 1. These descriptions will list the chief duties of each job category, and shall be in sufficient detail to inform applicants and employees of the general nature of each such job. It is not intended that the descriptions be exhaustive, or that they list all job duties. A copy of these descriptions shall be filed with the court, a copy shall be posted at every location at which notices of job vacancies and openings are posted, and a copy shall be furnished to any employee who requests the same.

24. (a) Employees interested in any vacancy or opening for which a notice has been posted pursuant to paragraph 23 shall be allowed to bid for such vacancy or opening. For purposes of such bids, defendant shall either provide spaces on the notice of job vacancies or openings or provide other sheets alongside such notice for signature of employees. An employee interested in bidding for a vacancy or opening shall then sign his name and list his current department and the date of his bid. Defendant shall maintain records of such bids and the vacancies or openings to which they relate. The vacancy or opening shall be filled by consideration of objective, racially-neutral and job-related standards previously furnished the court and made available to any interested employee. The vacancy shall be filled by the best qualified bidder, and in the event two or more persons are equal in their qualifications, the determination shall be made on the basis of plant seniority.

(b) The bidding system shall not require that the vacancy be filled by one not qualified when measured by the above objective, job-related and racially-neutral standards, which may include the employee's participation in training programs. Nor shall the bidding system prevent the defendant from maintaining a reasonable probationary period for employee placed in new jobs. However, if an employee is determined after the probationary period to be unable to perform the new job, defendant shall make reasonable accommodations to place the employee in a job category equal in pay to his immediately previous job and of the same shift.

25. The defendant shall not in any way seek to discourage any black employee from changing jobs, departments, plants or offices, or from requesting such a change. It shall freely allow such changes, in accordance with vacancies.

26. In order to meet the other obligations of this Decree, defendant is enjoined to establish reasonable training programs to facilitate employees in achieving necessary skills for higher-skilled and higher-paying jobs in defendant's plants enumerated in paragraph 1. Notice of the training programs shall be posted at every location where notices of job vacancies are posted. Such notice shall include the date of any training program, the type of training and the various jobs to which it will relate, the number of employees to be selected to participate, and a statement that the employee shall continue to receive his regular rate of pay. Any employee may request that he be selected for a training program and defendant shall provide methods necessary for such requests. Records shall be kept as to the name, race and sex of each employee requesting such training and the date the request was made.

Defendant shall select trainees on the basis of objective and racially-neutral standards. If seniority is necessary to selection, plant seniority shall govern. In no event shall less than fifty per cent of the annual number of employees selected be black. If necessary to meet that number, defendant shall take affirmative efforts to solicit black employees for the training program.

27. When a member of either subclass of present black employees changes jobs or departments, and when the change will ultimately result in an increased hourly or expected pay rate, but would also result in an immediate cut in hourly or incentive pay, his or her hourly or actual pay rate in the job held before the transfer shall be red-circled, and he or she shall continue to earn at his or her old pay rate, receiving the benefit of the general increases applicable thereto, until such time as he or she will earn more at the hourly or incentive pay rate for his or her new job. The obligations of this paragraph shall cease one year after the defendant's elimination of the pay rate disparities between blacks and whites, as discussed in paragraph 28, except (1) as to plants and offices where statistically significant racial pay rate disparities continue to exist and then only for as long as they exist, and (2) as to jobs specified in paragraphs 10, 15 and 16, but only for as long as the obligations of their respective paragraphs continue to exist.

VI. *Job Assignment Provisions*

28. Beginning with the calendar quarter thereafter:

(a) The defendant shall initially assign new black male hires and rehires so that their average full pay rate on the jobs to which they are initially assigned shall not be less than the average full pay rate of white male hires and rehires on the jobs to which they are initially assigned. It shall do the same for new black female hires and rehires, as compared with new white female hires and rehires.

(b) The defendant shall initially assign emloyees so that the proportion of new black male hires and rehires whose full pay rates on the jobs to which they are initially assigned are at the bottom of the defendant's pay scale shall not be more than the proportion of new white male hires or rehires whose full pay rates on the jobs to which they are initially assigned are at the bottom of the defendant's pay scale. It shall do the same for new black female hires and rehires, as compared with new white female hires and rehires.

(c) The defendant shall initially assign employees so that the proportion of new black male hires and rehires whose full pay rates on the jobs to which they are initially assigned are at the top of the defendant's pay scale shall not be less than the proportion of new white male hires and rehires whose full pay rates on the jobs to which they are initially assigned are at the top of the defendant's pay scale. It shall do the same for new black female hires and rehires, as compared with new white female hires and rehires.

The obligations of this paragraph shall cease two years after the defendant's elimination of the pay rate disparities between blacks and whites, as discussed in paragraph 30, except as to plants and offices where statistically significant racial pay rate disparities continue to exist and then only for as long as they exist.

29. The defendant shall not initially assign, promote or transfer employees hired or rehired after the entry of this Decree in a manner which causes or results in racial disparities in average pay rates, or in the proportions of such new employees at the bottom of the defendant's pay scale, or in the proportions of such new employees at the top of the defendant's pay scale, as between black and white males and as between black and white females.

30. The defendant is enjoined to implement the provisions in this Decree in such a manner as to eliminate the

disparities in earnings of black male employees as compared with white male employees and in earnings of black female employees as compared with white female employees. Specifically, defendant is enjoined to hire, assign, promote and transfer employees to eliminate the disparities noted in the court's Findings of Fact Nos. 60, 61 and 78.

31. The defendant shall not meet its obligations under any paragraph of this Decree by disproportionately discharging or laying off, or by seeking in any way to bring about the resignation of low-paid black employees within either of the subclasses of present black employees.

VII. *Lay-offs, Recalls and "Bumping" As An Alternative to Lay-Off*

32. A member of either subclass of present black employees who would otherwise be laid off shall be entitled to "bump" an employee with less plant seniority, as long as the junior employee's job can be performed by the subclass member with reasonable training by the defendant.

33. A member of either subclass of present black employees who has been laid off and who has unexpired recall rights, or whose recall rights are extended by virtue of this Decree, shall be recalled to any job which he or she can perform with reasonable training by the defendant, before any applicant can be hired for the job.

VIII. *Resolution of Disputes Under This Decree*

34. The policy of this Decree is to favor the informal resolution of disputes, without the intervention of the court, where this is possible.

35. The defendant shall designate an official, other than the Personnel Manager or a person subject to the Personnel Manager's supervisor, to act as an "Equal Employment Opportunity Complaints Officer". This officer shall receive and investigate complaints of discrimination, arising after the entry of this Decree, by black applicants and

employees and by blacks with unexpired recall rights or recall rights extended by virtue of this Decree. He shall attempt to resolve these complaints on an informal basis, and shall keep a record of all such complainants, of their complaints, and of everything which he has done to investigate and resolve them. His findings and the results of his efforts shall be included in his record of the complaint.

The name, address and office telephone number of this officer, and a statement of his or her functions, shall be prominently posted at every location at which the defendant takes applications for employment and at every location at which the defendant posts notices of job vacancies under the terms of this Decree. Each such notice shall also state that complainants who are dissatisfied with this process, or with its results, may contact counsel for plaintiffs or the union, whose names and addresses shall also be stated on the notice.

36. Instances of possible non-compliance with the Decree may be brought to the attention of the court, and proceedings to enforce the Decree may be prosecuted by counsel for plaintiffs, by an allegedly aggrieved class member through his or her own counsel, or by the union acting on behalf of an allegedly aggrieved class member. Counsel for any party may seek clarification of the Decree. Unless the circumstances require that such a situation be brought to the immediate attention of the court, counsel for the movant shall give other counsel of record a minimum of thirty days' notice, and additional time if it should seem to the movant that such additional time might produce a resolution, before bringing the matter to the attention of the court.

37. The provisions of paragraph 36 shall apply to objections by plaintiffs, or the union to the objective, racially-fair and job-related standards described in paragraphs 2, 13, 24 and 26; to motions to amend the Decree by any party, or motions relating to the court's retention of juris-

diction; to objections to the adequacy or accuracy of the job descriptions described in paragraph 23, and to objections to any matter as to which this Decree requires the defendant to give notice. It is permissible for plaintiffs, for complainants, for the union, and for the Special Master appointed pursuant to paragraph 38 to observe the practical effects of a practice of the defendant for a reasonable time before objecting to it or moving to challenge it.

38. (a) The court hereby appoints the Honorable Logan D. Howell, United States Magistrate, P.O. Box 25610, Raleigh, North Carolina, 27611, as Special Master under Rule 53 of the Federal Rules of Civil Procedure to administer the Decree and to hear and determine the matters described in paragraphs 36 and 37 and such other matters, including the discovery of facts, as are appropriate to resolve the matters described in paragraphs 36 and 37. The Special Master may act *sua sponte*.

(b) Reports of the Special Master's determinations of the matters described in subparagraph (a) may be reviewed by the court in accordance with the terms of Rule 53.

IX. ***Provision of Information***

39. Counsel shall confer and prepare an outline of the relief afforded by this Decree, which outline shall be printed and distributed to each member of the subclasses of present black employees, and which shall be published for three successive days in the Roanoke Rapids newspaper. Failing agreement, the parties will submit their proposals to the court and the court will decide on the text.

40. The defendant shall, for each of the facilities listed in paragraph 1, maintain stick sheets in the form exemplified in plaintiffs' Exhibit 105 but with the additional notation of the full pay rate next to the name of each job to which a person has been assigned. The stick sheets shall also include a new section showing the same information as the amended "Applicant Placement" section (including

full pay rate), but for persons who rejected job offers. Within fifteen days after the end of each calendar quarter, the defendant shall submit such stick sheets for that quarter to the court.

41. Within fifteen days after the entry of this Decree, the defendant shall notify the court of the date and amount of each general pay increase at its facilities in and around Roanoke Rapids, North Carolina which took effect after October 1, 1972.

42. Within fifteen days after the entry of this Decree, the defendant shall transmit to counsel for plaintiffs a copy of all data processing tapes containing personnel information about its facilities listed in paragraph 1, including the Customer Service Office and the Information Services Center, as of a date as close as possible to the date of the entry of this Decree, and a set of the formats and codes applicable to such tapes. The defendant shall identify and include on the tape the race of each person who appears on these tapes, and who has not already been race-identified. As soon as possible thereafter, plaintiffs shall prepare and file a list of the subclass of present black male employees, of the subclass of present black female employees, and of the comparably defined groups of white employees. Plaintiffs shall also prepare and file a statement of the present disparities in pay rates among these groups, and of any other information which may be useful for the purpose of identifying problem areas and aiding compliance with this Decree.

43. For such a period of time until the court otherwise orders the defendant shall transmit further data processing tapes and attendant information, of the type described in paragraph 42, at six-month intervals after the entry of this Decree, and shall identify thereon the race of all new employees. Plaintiffs shall as soon as possible thereafter prepare and file the information described in paragraph 42.

44. With or promptly after plaintiffs' submission of the printouts and statements described in paragraphs 42 and 43 above, plaintiffs shall submit to the court and the defendant a statement of expenses incurred, which shall include time spent by statistical or computer experts at a reasonable rate. The defendant shall have fifteen days to file objections thereto, which shall thereafter be resolved by the court. Within thirty days after the court's resolution, or within thirty days after the submission of the statement in the event that no objections are filed, the defendant shall pay the proper amount to counsel for plaintiffs.

45. Within fifteen days after the entry of this Decree, the defendant shall file with the court a list showing the name, race, sex, date of lay-off and new date of expiration of recall rights for each person whose recall rights are extended by virtue of the provisions of paragraph 20 of this Decree.

46. Every six months following the entry of this Decree, the defendant shall file with the court a statement of the amount and effective date of all general pay increases since the last such statement, and a statement of the steps it has taken to comply with paragraphs 11, 12, 13, 15 and 16 of this Decree, including but not limited to the name, race, sex, job, facility and date of placement for each person placed in jobs subject to these paragraphs. Whenever the defendant develops standards affecting job placement which it considers to be objective, racially fair and job-related, within the meaning of this Decree, it shall report them and their intended usage, in detail, to the court. Plaintiff may then examine any possible adverse racial impact of such standards and comment to the court and object to their usage if necessary.

47. The defendant shall promptly file with the court a copy of any written agreement it reaches with the union

through collective bargaining, and shall promptly file a copy of all agreed modifications thereto.

48. A copy of each document required by this Decree to be filed by the defendant with the court shall also be served upon counsel for plaintiffs, upon the union, and upon the Special Master. Counsel for plaintiffs, persons under his direct supervision, the union, and the Special Master shall have the right to examine the defendant's personnel records, including but not limited to records prepared under this Decree or which underlie documents submitted to the court pursuant under this Decree, at reasonable times, under reasonable conditions, and after reasonable notice to the court and to the defendant. Such inspection shall be solely for the purpose of monitoring compliance with this Decree.

Counsel for plaintiffs, members of the class, the union and the Special Master shall have the right to communicate with members of the class, to satisfy themselves as to compliance with this Decree.

The defendant shall have the right to examine the computer programs used by plaintiffs in analyzing the personnel data which it submits to plaintiffs.

Plaintiffs shall serve upon the defendant, upon defendant's counsel, upon the union, and upon the Special Master the documents and statements required by paragraphs 42 and 43 of this Decree.

X. *Award of Expenses Incurred Through February 20, 1976*

49. Plaintiffs are awarded their expenses incurred through February 20, 1976. These are (1) the amount of $30,530.33, as supported by the February 22, 1973 affidavit of counsel, plus interest from that date until the date of payment, at a rate of six per cent compounded annually, and (2) the amount of $1,152.70 for expenses incurred since that date, as supported by the February 23, 1976 affidavit

of counsel. The court will in the future provide for the payment of expenses incurred by counsel for plaintiffs after February 20, 1976, in the course of reasonable representation of the class herein.

/s/ F.T. DUPREE, JR
F.T. Dupree, Jr.

United States District Judge

June 25, 1976.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1988

LUCY M. SLEDGE, et al
Plaintiffs-Appellees

v.

J.P. STEVENS & COMPANY, INC.
Defendant-Appellant

Filed September 30, 1976

ORDER

We have considered the motion for a stay of the order of the district court appealed from filed June 25, 1976 and are of opinion it should be granted.

The order appealed from in this employment case imposes a rigid system of racial quotas for almost every aspect of the employee's relation with his employer. Especially made subject to racial quotas are hiring, assignments, promotions, and certain transfers. We think there is a substantial question as to whether or not the imposition of such rigid quotas, although remedial, was justified. In the order of the district court denying a stay pending appeal, it expressed "real apprehension that the implementation of its decree may in fact cause considerable hardship if not indeed disruption of the operation of the defendant's business, with the very real possibility that many of the members of the class sought to be protected by the decree as well as many innocent employees of the defendant may be adversely affected." We agree with this analysis of the district court.

We are further of opinion, however, that the appeal should be accelerated.

It is accordingly Adjudged and Ordered as follows:

I

The order of the district court appealed from shall be, and it hereby is, stayed during the pendency of this appeal and until the further order of this court.

II

The Clerk will arrange with the attorneys a schedule for the filing of all papers in this case so that, if at all possible, the case may be heard on its merits at the November term of this court.

With the concurrence of Judge Field.

/s/ H. E. WIDENER
For the Court

CRAVEN, Circuit Judge, dissenting:

I agree with Judge Dupree that the defendant has not shown that it will likely prevail on the merits of the appeal. See *Franks* v. *Bowman Transportation Company, Inc.*, US 47 L.Ed.2d 444 (1976); *Patterson* v. *American Tobacco Company*, 535 F.2d 257 (4th Cir. 1976). I am also unable to perceive any irreparable injury to the defendant if the stay is denied. The remedy ordered by the district judge with respect to hiring is operative on a quarterly basis. If the appeal were accelerated, we would doubtless decide the merits before any important shift in personnel or other effects of serious proportion. Meanwhile, in view of what seems to me and to the district judge the likelihood of affirmance, the plaintiffs will be substantially harmed by the stay.

I am unable to conclude that the district judge has abused his discretion, and would accelerate the appeal and deny defendant's motion for a stay of the order of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

Civil No. 1201

LUCY M. SLEDGE, et al.,
Individually and on behalf of all others similarly situated,

Plaintiffs

v.

J.P. STEVENS & CO., INC.,

Defendant

Filed Sept. 10, 1976

ORDER CONCERNING BACK PAY

The case is now before the court for decision as to the standards and procedures to be used for handling the back pay determinations to be made pursuant to Conclusion of Law No. 10(b) of the court's Findings of Fact and Conclusions of Law dated December 22, 1975. Plaintiffs and the defendant have presented their proposals and supporting materials to the court, and they have been fully considered. By the terms of the order allowing Textile Workers Union of America to intervene as a party plaintiff, and to which it consented, the Union has not participated in the proceedings to establish such standards and procedures.

The court is of opinion that before such standards and procedures are finally determined it should ascertain the names and addresses of all potential claimants and establish a cutoff date beyond which claims may not be filed. To this end it is now

ORDERED:

1. That the plaintiffs and defendant from all records and compilations available submit to the Clerk of this court at the earliest date possible but not later than September 30, 1976, a list of the names and addresses of all members of the class as defined in paragraph 7 of the court's Conclusions of Law dated December 22, 1975;

2. That as soon thereafter as practical but not later than October 15, 1976, the Clerk of this court shall mail to each member of the class as shown on the lists submitted a notice in the form attached to this order and a back pay questionnaire and claim form also attached hereto;

3. That the defendant shall immediately post on the bulletin boards at each of its facilities at Roanoke Rapids, North Carolina a copy of said notice together with a notice that the back pay questionnaire and claim forms may be obtained at the defendant's personnel office at Roanoke Rapids (a supply of such forms to be prepared for this purpose); and

4. All expenses in connection with the compilation of the list of members of the class and the mailing of the notices and claim forms shall be borne by the defendant.

The plaintiffs have submitted a proposed order establishing the standards and procedures for making back pay determinations. The defendant, if it cares to do so, may submit its own proposed order on or before November 15, 1976. The court will without further argument enter its order establishing the standards and procedures for the determination of back pay during the week of November 22, 1976.

/s/ F.T.DUPREE, JR.
United States District Judge

September 10, 1976.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

Civil No. 1201

LUCY M. SLEDGE, et al.,
individually and on behalf of all others similarly situated,
Plaintiffs

v.

J.P. STEVENS & CO., INC.,
Defendant

Filed Sept. 10, 1976

NOTICE TO CLASS MEMBERS CLAIMING BACK PAY

TO: ALL BLACK EMPLOYEES OF J.P. STEVENS & CO., INC., AT ITS ROANOKE RAPIDS, NORTH CAROLINA PLANTS AND ALL MEMBERS OF THE CLASS AS HEREIN DEFINED:

NOTICE IS HEREBY GIVEN THAT:

On October 2, 1970 a civil action was filed in the United States District Court for the Eastern District of North Carolina, Wilson Division, by Reginald Harrison, Lucy Sledge and others as plaintiffs against J.P. Stevens & Co., Inc., as defendant, seeking relief under Title VII of the Civil Rights Act of 1964. This law prohibits among other things discrimination in employment on the grounds of race or color. During the pendency of the action the plaintiff Harrison withdrew from the suit, and it was thereafter prosecuted by Lucy Sledge and eleven other named individuals under the title as shown above on behalf of them-

selves and members of a class defined by an order of the court dated September 29, 1972 as follows:

> "(a) All Negroes employed at all the Roanoke Rapids plants of J.P. Stevens & Company, Inc., on and after October 2, 1967; and
>
> "(b) All Negroes who have applied for employment at said Roanoke Rapids plants since October 2, 1967, who claim to have been affected by the alleged racially discriminatory employment practices of the defendant."

The claims of Lucy Sledge and her eleven co-plaintiffs were found by the court to be without merit and were denied. On the basis of unrebutted statistical evidence, however, the court found that members of the class as above defined had been discriminated against contrary to the requirements of the Civil Rights Act of 1964, and in a decree entered by the court under date of June 25, 1976 the defendant, J.P. Stevens & Co., Inc., was permanently enjoined from engaging in any act or practice which has the purpose or effect of discrimination against any individual, whether employee or applicant for employment, because of his or her race, at any of its facilities in and around Roanoke Rapids, North Carolina. The issue as to monetary relief (back pay), having been severed and reserved for future disposition, is now before the court. The defendant has denied the material allegations of the plaintiffs' complaint and all liability to the members of the class as well as the twelve individual plaintiffs and has appealed the court's ruling on the issue of injunctive relief to the United States Court of Appeals for the Fourth Circuit.

If you come within either or both of the definitions of the class as set forth above, and if you consider that because of your race and color, J.P. Stevens & Co., Inc., failed to hire you or to place you or promote you as you desired—and if you wish to make formal claim against J.P. Stevens & Co., Inc., for back pay or other monetary relief

on that account—you are hereby notified and given the opportunity of commencing such claim by filling in and signing and mailing, or delivering, the enclosed claim form.

If you wish to file such claim, November 15, 1976 is the final date for so doing. If the enclosed form is not filled in, signed and filed in the Office of the undersigned at the address shown on or before that date, your right to make such claim will expire and be forever barred.

If you desire to file the enclosed claim form it is necessary that you write "Yes", either after Question 1 or after Question 2. You may write "Yes" after both Questions 1 and 2 if they both apply to you.

If you file the enclosed claim form it is also necessary that you write "Yes" after Question 3, for in order to make a claim you must be willing to appear before the court, or before a special master appointed by the court, upon reasonable notice and be questioned in detail by the court, or by the attorneys on either side of the case, with regard to all matters legally pertinent to your claim.

The claim form must also be signed by you and your home address and telephone number (if you have a telephone through which you may be reached) must be given in the spaces provided. The completed form must be mailed or delivered to the undersigned Clerk of the United States District Court for the Eastern District of North Carolina at the address shown below.

This 10th day of September, 1976.

/s/ JOHN R. WHITTY, CLERK
John R. Whitty, Clerk
United States District Court
Eastern District of North Carolina
P.O. Box 25670
7th Floor, Federal Building
310 New Bern Avenue
Raleigh, North Carolina 27611

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

Civil No. 1201

LUCY M. SLEDGE, et al.
individually and on behalf of all others similarly situated,
Plaintiffs

v.

J.P. STEVENS & CO., INC.,
Defendant

Filed Sept. 10, 1976

BACK PAY QUESTIONNAIRE AND CLAIM

1. Do you claim that on or after October 2, 1967 you applied for employment at the Roanoke Rapids, North Carolina Plants of J. P. Stevens & Co., Inc., and that because of your race and color the Company failed to hire you?

ANSWER:_____

2. Do you claim that on or after October 2, 1967 you were employed at the Roanoke Rapids, North Carolina Plants of J. P. Stevens & Co., Inc., and that because of your race and color the Company failed to place or promote you as you were seeking?

ANSWER:_____

3. Are you willing to submit and respond to questioning by the court or by the attorneys in this case at Raleigh, North Carolina or at some other appointed place upon notification with regard to all matters legally pertinent to any claim you make?

ANSWER:_____

In order to make formal claim again J. P. Stevens & Co., Inc., I have answered this questionnaire and am affixing my signature and designating my home address and telephone number below.

This _____ day of _____, 1976.

_____
Signature

_____
Home Address

_____
Telephone Number

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WILSON DIVISION

Civil No. 1201

LUCY M. SLEDGE, et al.
individually and on behalf of all others similarly situated,
Plaintiffs

v.

J. P. STEVENS & COMPANY, INC.,
Defendant

Filed Oct. 1, 1976

ORDER DENYING MOTION TO AMEND BACK PAY ORDER

The plaintiffs have filed under date of September 21, 1976 a motion to amend and supplement the order concerning back pay entered herein on September 10, 1976. The defendant has not responded to this motion and the time for responding has not expired. The court is informed, however, that defendant filed with the United States Court of Appeals for the Fourth Circuit a motion to stay all further proceedings in this action pending determination of the defendant's appeal from the court's decree entered herein on June 25, 1976 and that said motion has either been denied or remains undetermined as of this date.

The court has carefully reviewed plaintiffs' motion to amend, and while finds some of plaintiffs' proposals unobjectionable from a legal standpoint, the court is not pursuaded that its back pay order as originally entered is erroneous in any respect, and in the court's discretion the motion to amend the order is therefore denied.

Plaintiffs have indicated their desire to appeal any adverse ruling on their motion, and in view of the long time in which this case has been pending and the prospect of further delay by reason of the pending appeal the court is of opinion that as much of the case as possible should be presented to the Court of Appeals for decision at the earliest possible date. Accordingly pursuant to 28 U.S.C. § 1292(b) the court, being of opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of this litigation, so states at this time in order that the Court of Appeals may, in its discretion, permit an appeal from this order provided application is made to it within ten days from this date. Meanwhile further proceedings herein are stayed in this court pending action of the Court of Appeals for the Fourth Circuit on plaintiffs' application if made within ten days from this date.

The plaintiffs have filed under date of September 26, 1976 a further motion to stay proceedings under paragraphs 1 through 3 of the back pay order of September 10, 1976 pending the court's ruling on their motion to amend which ruling is now set forth above, and the stay ordered above covers this second motion of the plaintiffs. Should the plaintiffs petition to the Court of Appeals for a certificate under 28 U.S.C. § 1292(b) not be granted, plaintiffs may notify the court and a further extension of time for compliance with the court's back pay order of September 10, 1976 will thereupon be ordered.

/s/ F.T.DUPREE, JR.
F. T. Dupree, Jr.
United States District Judge

October 1, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

Civil No. 1201

REGINALD L. HARRISON, et al,

Plaintiffs

v.

J.P. STEVENS & COMPANY, INC.,

Defendant

Filed June 17, 1971

ORDER

This class action is before the court on (1) defendant's "motion to define the scope of the action"; (2) the motion of seven Georgia, fifteen North Carolina, fourteen South Carolina and three Virginia residents, all of whom are employed or claim to have been denied employment at plants of the defendant outside Roanoke Rapid, North Carolina, to intervene as parties plaintiff in the action which involved orignially only the Roanoke Rapids plants of the defendant; and (3) the motion of plaintiffs to require the defendant to respond to plaintiffs' interrogatories and requests for production of documents. Upon consideration of the pleadings, argument of counsel and the applicable law the court finds that the questions of law and fact common to the members of the class predominate over questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy, and the case should be allowed to proceed as a class action.

But it has been made to appear that several similar actions have been instituted against this defendant in other states, at least one of which is still pending, involving

the same claims as are here in controversy; that defendant has seventy-five plants located in twelve judicial districts and two circuits of the United States Courts in five southern states; that it would not be desirable to concentrate all of such litigation in the Eastern District of North Carolina where this court, already laboring under continuously-scheduled courts and faced with a clogged civil docket, does not have the time nor the manpower to assume jurisdiction outside the district much less outside the state; that an action of the dimensions proposed by the plaintiffs herein would in fact be unmanageable, particularly in view of the back pay claims being made on behalf of members of the class and the notice provisions of Rule 23; and that in this, as in all class actions, there exists the potential of abuse of the procedure, intentional and inadvertent. Moreover, it would be difficult, if not impossible, for the court to find that the named plaintiffs and their counsel in this action could fairly and adequately protect the interests of a class whose membership extended over such a wide geographic area. Yet counsel for plaintiffs indicated in response to an inquiry by the court that the plaintiffs would not be satisfied to limit the class to the employees, past, present and prospective, in the defendant's North Carolina plants.

Upon consideration of the foregoing and in the exercise of its discretion the court makes the following rulings and it is

ORDERED:

1. That this action may be maintained as a class action pursuant to the provisions of Rule 23 of the Federal Rules of Civil Procedure.

2. The class which plaintiffs represent is preliminarily designated as follows:

(a) All Negroes employed at all the Roanoke Rapids plants of J.P. Stevens & Company, Inc., on and after October 2, 1970.

(b) All Negroes who may hereafter apply for or be emloyed at said Roanoke Rapids plants who may be affected by the alleged racially-discriminatory employment practices of the defendant.

3. The time in which defendant may file answer to the plaintiffs' amended complaint is extended to and including July 15, 1971.

4. Defendant is directed to make response with respect to plaintiffs' interrogatories and request for production of documents insofar as the same may relate to defendant's Roanoke Rapids, North Carolina, plants on or before August 1, 1971.

5. The time in which discovery may be completed is extended to and including October 15, 1971.

6. All parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning this action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication by order of this court. Any such proposed communication shall be presented to this court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this court of the proposed communication. The communications forbidden include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by

class members to opt out of the action under subparagraph (b)(3) of Rule 23; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of this class action, and of any actual or potential orders herein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the courts, or the administration of justice. The obligations and prohibitions of this order are not exclusive, and all other ethical, legal and equitable obligations remain unaffected by the order. Neither does the order forbid communications between any attorney and his client, or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney.

7. The motion to intervene filed herein by the North Carolina and out-of-state residents referred to above on December 22, 1970, is denied.

8. The court retains jurisdiction under Rule 23(c)(1) to correct, modify, vacate or supplement this order from time to time before the decision of the action on the merits as it may deem proper.

This June 17, 1971.

/s/ F.T. DUPREE JR.
F.T. Dupree, Jr.
United States District Judge

Supreme Court, U. S.
FILED
MAR 2 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1185

LUCY M. SLEDGE, ET AL,

Petitioners

vs.

J. P. STEVENS & CO., INC.,

Respondent

On Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT, J. P. STEVENS & CO., INC., IN OPPOSITION TO PETITION

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On Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT, J. P. STEVENS & CO., INC., IN OPPOSITION TO PETITION

THE AREAS OF THE CASE AS TO WHICH THE PETITIONERS SEEK REVIEW

The Decree and the Orders of the District Court in this case included principally:

(1) A broad and permanent general injunction.

(2) A comprehensive program, "rigorous and specific" in nature, requiring a wide "array" of on-going affirmative actions on the part of the Respondent Company[1].

(3) A series of extreme, and apparently unprecedented, directives to the Respondent Company to

[1]Petition Appendix, pp. 30a, 31a, 43a.

bring about various prescribed mathematical ratios or quotas among its employees, shaped and determined according to race.

(4) A directive that back pay shall be awarded to members of the plaintiff class upon terms and conditions to be later prescribed by the Court[1].

These orders and requirements were left in effect by the Court of Appeals, except as to the mandatory racial ratios or quotas, which were rejected by the Court of Appeals. As to the other three categories of directives delineated above, the plaintiffs of course do not petition this Court for review.

With respect to the racial quotas, category "(3)" above, the District Court decreed such quotas on a variety of subjects, including the hiring of employees, their initial placement, their transfer and lay-off, their preferment and promotion, and their pay and earn-

[1]With regard to these orders and directives, it should be noted that the District Court, in denying a stay pending the Company's appeal to the Court of Appeals, commented as follows:—"This court is sympathetic with the defendant's position and is not without real apprehension that the implementation of its decree may in fact cause considerable hardship if not indeed disruption of the operation of the defendant's business, with the very real possibility that many of the members of the class sought to be protected by the decree as well as many innocent employees of the defendant may be adversely affected. The court's reading of the cases, however, has left it with the very definite impression that any relief short of that provided in the decree would not pass muster in the appellate courts at this time" (Joint Appendix in the Court of Appeals, p. 527).

ings, but the Court of Appeals, as the Petition concedes[1], rejected all quotas in the case. Yet, it is to be noted that the plaintiffs ask this Court to review only the appellate Court's reversal of "the hiring and initial assignment quotas".[2]

In addition to the principal categories of directives outlined above, there were other related or peripheral matters as to which the rulings in the District Court and in the Court of Appeals were as follows.

The District Court held that the Company's departmental seniority system, though applied "evenly to all races" and instituted and maintained "free from any discriminatory purpose", violated Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981. The Court of Appeals reversed this ruling[3]. The Petition requests review of that reversal[4].

In its Order permitting this case to proceed as a class action and defining the class, the District Court placed certain restrictions upon "all parties" and "their counsel" in regard to communications with class members or "potential" class members, without first obtaining the consent of the Court—such restrictions not to be applicable, however, to any "communica-

[1]Petition, pp. 12, 13, 14 and footnote 17.

[2]Petition, pp. 4, 14, 21. The phrases "hiring quotas" and "hiring and initial assignment quotas" are apparently used interchangeably in the Petition.

[3]Petition Appendix, pp. 19-21.

[4]Petition, pp. 4, 22-23.

tions between any attorney and his client, or a prospective client who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney[1]. The Court of appeals did not specifically discuss this directive. The Petition, however, states that it "was necessarily affirmed" by the Court of Appeals, and the Petitioners request review of such affirmance[2].

After issuing its Decree, and preliminary to entering upon the ascertainment of individual back pay entitlements, the District Court issued an Order for the mailing and posting of a notice to all class members, together with a form for the signifying of desire to claim back pay. The plaintiffs sought and obtained permission to take an interlocutory appeal from that Order. The Court of Appeals affirmed the Order. The Petition[3] requests review of that affirmance[4].

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[1]Petition Appendix, pp. 146a-147a.

[2]Petition, pp. 2-3, 15-17, 19-20.

[3]Petition, pp. 3-4, 8-11, 17-19, 20-21.

[4]To complete the picture of the rulings and appeals in the case, the following might also be noted. The District Court, in its Findings and Conclusions after trial, dismissed each and all of the named plaintiffs from the case—either because they had withdrawn from the case or had taken the witness stand but had failed to show any discrimination by the Respondent against themselves. The District Court ruled, however, that by reason of "an apparent anomaly in practice and procedure in employment discrimination class actions", the dismissal of all class representatives from the case did not prevent the case from continuing to move through the courts as a class action. That ruling, the Court of Appeals affirmed.

(This footnote is continued on page 5)

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

The Request For Review As To the Court Of Appeals' Reversal Of Racial Hiring Quotas

With regard to the Petitioners' request for review of the appellate Court's disapproval of the mandatory racial hiring quotas imposed by the District Court, it is submitted that the presentation in behalf of this request for review is significantly unimpressive and indeed meager. The plaintiffs devote less attention to this central aspect of the case than to the miscellaneous subjects of their Petition.

The racial quota directive, as to which the Petitioners request review, was that in each calendar quarter, to whatever percentage of the white applicants for jobs the Company actually offers jobs, it must multiply that same percentage figure against all blacks who apply for jobs during that quarter, and

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(Continued from page 4)

Meanwhile, the class representatives, who had been dismissed after failing to prove any wrongful discrimination against themselves, individually appealed. The Court of Appeals reversed the District Court as to their individual dismissals from the case and declared them still individually entitled to make back pay claims in any future back pay proceeding. In so doing, however, the Court of Appeals entered upon a discussion as to what would be the Company's "burden" with respect to such claimants in such a proceeding —in which the Court of Appeals set forth observations which would seem to have been not only premature and dictum but also, as this Court has very recently specifically emphasized, an incorrect description of the employer's "burden" in such situation.

whatever number results from that process of multiplication, would represent the number of blacks to whom the Company *must* offer jobs during that period[1]. For example, under this directive, if 10 whites and 100 blacks apply for jobs, and if the Company offers jobs to 5 of the whites, then automatically it *must* offer jobs to 50 of the blacks—or to ten times more blacks than whites. Similarly, if one white applies and the Company offers him a job, then it must offer jobs to *all* blacks who apply, no matter how many.

The Respondent has been able to find no instance in which any appellate court has accepted or approved a directive for the hiring of employees according to this extraordinary mathematical racial formula.

Moreover, the amazing irony of the situation is that when this directive was issued, the Company already had, in the plants to which the case relates, a work force balanced between blacks and whites almost exactly as is the work force of this area—and had for years been hiring blacks at a rate much higher than their proportion in the work force of the area.

In addition to such being the statistical state of affairs at the time the District Court issued its Decree, that Court had already determined, in its Findings and Conclusions after trial of the case, that "the management of Stevens has not consciously or knowingly engaged in discriminatory employment practices, and there is no evidence of any specific overt employment practice which has operated to deprive blacks of equal employment opportunities"[1].

[1]Indeed, the directive went further and required that the Company should fulfill this process as to males and females separately—although there is no allegation whatever in this case supporting or permitting any order against the Company that differentiates as to sex.

In the light of these and similar facts and circumstances, the decision of the Court of Appeals was that in this case it did not need to consider "the ultimate question" of whether the imposition of racial quotas "is permissible as "an abstract issue", nor undertake to resolve "the troublesome questions of possible statutory and constitutional conflict inherent in the use of quotas"[2].

The Court pointed out that there is apparent universal agreement that racial ratios and quotas should not in any event be imposed by courts in the absence of "compelling need" therefor, nor where "effective relief can be granted without resort to this device"[3]. Here, said the Court, "the record on appeal itself refutes any contention that the requisite 'compelling circumstances' were present to justify this aspect of the Decree"[4]. The Court thereupon concluded "we find the hiring ratios to be inappropriate on the facts of this case"[5].

[1]Petition Appendix, p. 96a.

[2]Petition Appendix, pp. 37a, 42a.

[3]Petition Appendix, p. 36a.

[4]Petition Appendix, p. 38a.

[5]Petition Appendix, pp. 35a, 38a.

The Court of Appeals reasoned that upon consideration of "whether the discrimination to be remedied has been egregious, purposive or blatant", or upon consideration of "the effectiveness" of the employer's "own efforts to correct past inequities", or upon consideration of "whether other" relief granted in the case is "capable of redressing" the "prior discrimination"—upon none of these considerations, the appellate Court concluded, do the facts and circumstances of the case justify any such racial hiring ratios or quotas as were decreed by the District Court[1].

The Court pointed out that factors "which were found to have accounted for" statistical imbalance in the Company's "hiring process" during earlier years "are directly and sufficiently addressed by other provisions' of the District Courts Decree[2]. In its Opinion, the Court outlines at some length—though even so not exhaustively—the numerous and strict directives, other than quotas, for specific and continuing affirmative actions which the District Court's Decree requires of the Company[3]. "In the event", says the Court, "that the remedial measures which we have summarized do not appear to be accomplishing this goal, then, exercising the jurisdiction it has retained, the Court may, on a record of the particular weaknesses or deficiencies of the relief measures, consider modification of the decree and tailor it to address the problem areas"[4].

[1]Petition Appendix, pp. 37a-38a.

[2]Petition Appendix, p. 40a.

[3]Petition Appendix, pp. 40a-42a.

[4]Petition Appendix, p. 42a.

The Respondent recognizes, of course, that *Regents of the University of California vs. Allan Bakke*, — U. S. —, 57 L. Ed 2d 750 (1978) is not directly in point here. Nevertheless, the decision in that case potently confirms that this Court takes no favorable view of mandated formulae for racial ratios or quotas —and that, as the Court there emphasized, "racial and ethnic distinctions of any sort are inherently suspect". *Bakke*, 57 L. Ed 2d 750, 771.

It certainly does not seem likely that this Court, in the facts and circumstances presented by the present case, would consider reestablishing the extreme form of racial directive which has been here carefully weighed and rejected by the Court of Appeals.

The Request For Review As To The Court Of Appeals' Affirmance Of A Limited Supervision Of Class Communications

As has been hereinabove mentioned, the District Court, in its Order permitting this case to proceed as a class action and defining the class, included a paragraph requiring its consent to communications with class members or potential class members who were not named plaintiffs in the case[1].

As was stated in this restriction, it applied not merely to the plaintiffs and attorneys for the plaintiffs, but to "all parties hereto and their counsel"[2]. It exempted from its provisions, however, "communications between any attorney and his client, or a pro-

[1]Petition Appendix, pp. 146a-147a.

[2]Petition Appendix, p. 146a.

spective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney"[1].

Likewise the District Court, later in the proceedings, readily gave the plaintiffs and their attorneys permission to contact class members for purpose of "locating witnesses and obtaining trial testimony"[2]. Still further, upon the rendering of its Decree in the case, the District Court expressly provided that "counsel for plaintiffs, members of the class, the Union and the Special Master shall have the right to communicate with members of the class, to satisfy themselves as to compliance with this Decree"[3].

It is also to be noted that with respect to class actions, Rule 23(d) of the Federal Rules of Civil Procedure provides that:—"In the conduct of actions to which this rule applies, the court may make appropriate orders . . . (3) imposing conditions on the respective parties or on intervenors". The Petitioners broadly assert, however, that the District Court's Order regarding communications with class members invaded their constitutional rights.

Upon analysis, it will be seen that the decisions dealing with Court supervision of such communications are concerned mainly with the protection of First Amendment rights relative to the instituting of

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[1]Petition Appendix, p. 147a.

[2]Petition, p. 7.

[3]Petition Appendix, p. 131a.

litigations, prior to the certifying of a class action or defining of a class. After the latter stage has been reached however—as was the situation when the restrictive order here in question was issued—the authorities definitely recognize a trial court's legitimate interest in exercising such supervision as may be reasonable and needful to the management of these broad and complex class actions.

Neither *In Re Primus*, — U. S. —, 56 L. Ed 2d 417 (1978)—the latest case in this Court cited by the Petitioners and touching upon this subject—nor any of the other cases which the Petitioners refer to, contradict this. For example, when the *Rodgers* case, cited by the Petitioners, was first before the Third Circuit Court of Appeals, that Court emphasized the "undoubted power" of the trial court "to impose some restrictions on First Amendment rights during the course of judicial proceedings" after a "favorable class action determination". In that case the Court further said:

> "Once a favorable class action determination has been made, the justification for the Rule is said to flow from the court's power, and even duty, to prevent the Rule 23 procedural device from being misused by communications which are false or misleading".
>
> *Rodgers vs. United States Steel Corp.*, 508 F. 2d 152, 162 (3rd Cir., 1976)

The Request For Review As To The Court Of Appeals' Affirmance Of Steps Preliminary To Back Pay Proceedings

This request for review relates to an Order issued by the District Court as it approached the hearing and determination of individual back pay claims. The Court reasonably needed to inform class members that it was going to hear such individual claims, and it reasonably needed to know who were the individuals who would be making such claims.

Therefore the District Court directed that there be mailed to each member of the class, and also posted at the plants involved, a notice worded by the Court and briefly explaining the subject of back pay rights in the case, together with a claim form on which each class member should answer "Yes" or "No" as to whether he or she wished to make claim and would be willing to appear and respond to questioning regarding such claim.

The Petition terms this procedure "nonfunctional", or "functionless"[1], though it obviously serves a very natural and reasonable purpose. It is a procedural step authorized by the Federal Rules of Civil Procedure.

> "In the conduct of actions to which this rule applies, the court may make appropriate orders: . . .
>
> "(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members . . . of the opportunity of members . . . to . . . present claims . . ."
>
> Federal Rules of Civil Procedure, Rule 23(d)(2)

[1]Petition, pp. 18-19.

The Petition characterizes "language" of the claim form prescribed by the Court as "misleading and confusing"[1]. On the contrary, it is submitted that this form is about as simple as could be[2]. Indeed it is not essentially different from what the plaintiffs requested in a Motion to Amend[3].

The Petition contends that the Court's form, on which individual class members would state whether they do or do not wish to claim back pay, is an "opt-in" requirement and as such is "a clear abuse of discretion"[4]. As "authority" for this, the Petition cites the "Manual for Complex Litigation, §1.45". Quite to the contrary, however, this Manual speaks approvingly of such procedure and requirement at the back pay stage with which the District Court was here dealing.

> "It appears that a proof of claim to be submitted after a judgment establishing liability is most often the surest way of utilizing the procedure so that it does not confuse or prejudice absent class members

[1]Petition, p. 10.

[2]Petition Appendix, pp. 140a-141a.

[3]Petition Appendix, p. 10.

[4]Petition, pp. 18-19.

or require proof which cannot be obtained at the outset of a case. 'More often . . . the courts await the adjudication of the liability issue before adopting procedures to notify class members to come forward and assert their claims' ".

Manual For Complex Litigation,
§1.45, p. 38

"A court may . . . give . . . an additional notice, under [Rule 23] (d)(2) to class members who do not opt out, and require them to take some affirmative action as a condition of ultimate recovery".

3B Moore's *Federal Practice,*
¶23.55 at 23-1161 (2d Ed., 1969)

"On the other hand, once defendant's liability is established, the court may be justified in ordering a second notice sent pursuant to Rule 23(d)(2) requiring class members to file statements of their claims and barring those not presented at that time".

7A Wright & Miller, *Federal Practice and Procedure,* §1787, p. 159

The authorities are overwhelmingly to the effect that a notice to class members—and a requirement that the individual class member declare himself a claimant and respond to relevant questioning in order to be considered for monetary award—is lawful and reasonable and appropriate. *Robinson vs. Union Carbide Corp.* 538 F. 2d 652 (5th Cir., 1976) and 544 F. 2d 1258 (5th Cir., 1977), cert. denied, 434 U. S. 822 (1977); *Bing vs. Roadway, Inc.,* 485 F. 2d 441, 448-

449 (5th Cir., 1973); *Thornton vs. East Texas Motor Freight,* 497 F. 2d 416, 422-423 (6th Cir., 1974).

The Court of Appeals therefore rightly held that there was "no reversible error in the District Court's imposition of the claim-filing requirement prefatory to the proceedings for back pay relief"[1]. The Court concluded that "we find the filing proviso to be an appropriate first step toward the eventual assessment and resolution of the compensation claims"[2].

The Request For Review As To The Court Of Appeals' Reversal Of the District Court's Ruling Regarding Departmental Seniority

With regard to the Respondent's "departmental seniority" system, the Court of Appeals noted that "the plaintiffs here concede that they do not challenge the bona fides" of this system and that it applied "evenly to all races" and was established and "maintained free from any discriminatory purpose"[3]. Therefore, said the Court, "the conclusion that the departmental seniority system violated Title VII must be reversed", and that "for the same reason, the conclusion that it violated §1981 must also be set aside"[4].

The Court of Appeals pointed out that such reversals were required by Section 703(h) of Title VII[5], as

[1]Petition Appendix, p. 49a.

[2]Petition Appendix, p. 49a.

[3]Petition Appendix, p. 15a.

[4]Petition Appendix, p. 15a.

[5]42 U.S.C. §2000e-2(h).

interpreted and applied by the Fourth Circuit Court of Appeals in *Johnson vs. Ryder Truck Lines, Inc.*, 575 F. 2d 471 (4th Cir., 1978) and by this Court in *International Brotherhood of Teamsters vs. United States*, 431 U. S. 324, 343-357 (1977)—both of which were decided after the District Court declared the Respondent's departmental seniority system to be invalid.

Apart from the correctness of this ruling by the Court of Appeals, there is in any event no occasion for this Court to consider reviewing this matter—for the subject is largely academic in this case. As the Respondent emphasized in the Court of Appeals, there is essentially no contest between the parties with respect to the Respondent's departmental seniority system. This comes about by reason of the following circumstances.

At the same plants which are here involved, the employees are represented by the Union which is Intervenor in this case. At all of its other plants, the Respondent Company in recent years established a job posting and job bidding system on the basis of plant-wide seniority, as distinguished from departmental seniority—which applies to all employees and eliminates the departmental seniority characteristics that the District Court in the present case found to be unlawful.

The Respondent has informed the plaintiffs and the Union that it is willing at any time to make the same change at these plants. The Respondent is under legal obligation, however, to bargain with the Union regarding such change, and is doing so, but the Union has not yet seen fit to agree to the change. Nevertheless, if the District Court's Order invalidating the departmental seniority system had not been reversed, it would have become the superior duty of the Company to obey that Order with regard to the black employees in these plants.

In any event, since the Company's position is that of offering to establish in these plants, as it has already done in all its other plants, a plant-wide seniority system—though no court order now requires it to do so—the situation would certainly not seem to be one in which this Court should consider burdening itself to review the validity of the departmental seniority system.

CONCLUSION

Upon all of the foregoing the Respondent respectfully submits that a Writ of Certiorari should not be issued in this case.

WHITEFORD S. BLAKENEY
Attorney for the Respondent

Supreme Court, U. S.
FILED
MAR 2 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1978

No. 78-1185

LUCY M. SLEDGE, ET AL.,
Petitioners,

v.

J. P. STEVENS & CO., INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION IN SUPPORT OF PETITION FOR CERTIORARI

JONATHAN R. HARKAVY
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In The
Supreme Court of the United States
October Term 1978

No. 78-1185

LUCY M. SLEDGE, et al.,

Petitioners,

v.

J. P. STEVENS & CO., INC., et al.,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

BRIEF OF RESPONDENT AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION IN SUPPORT OF PETITION FOR CERTIORARI

Respondent Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC[1] (the "Union") respectfully submits this brief in support of petitioners' prayer that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case. The opinion of the court of appeals is reported at 585 F.2d 625.[2]

ADDITIONAL CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> "Congress shall make no law. . . . abridging the freedom of speech. . . or the right of the people peaceably to assemble. . . ."

The pertinent provisions of §9 of the National Labor Relations Act, as amended ("NLRA"), 29 U.S. §159, are:

> "(a) Representatives designated or selected for the purposes of collective bargaining by the majority of

1/ Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, is the successor by merger to Textile Workers Union of America, AFL-CIO, CLC.

2/ The Union's comments are limited to Questions 1, 2 and 3 presented by the petitioners. The Union takes no position on Questions 4 and 5.

the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all of the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ."

The pertinent provisions of 28 U.S.C. §2072 are:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the districts courts of the United States in civil actions . . . .

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution. . . ."

THE POSTURE OF THE UNION IN THIS LITIGATION

On September 6, 1974 the Union was certified by the National Labor Relations Board as the exclusive collective bargaining representative of the production and maintenance employees of Respondent J. P.

Stevens & Co., Inc. ("Stevens") at its Roanoke Rapids, North Carolina facilities pursuant to §9 of the NLRA. This certification followed an election in which a majority of Stevens' employees in the certified bargaining unit selected the Union as its collective bargaining representative. The Union and Stevens have not entered into a collective bargaining agreement.3/

The Union did not participate in the liability stage of this litigation in the district court. It intervened after findings of facts and conclusions of law were entered for the purpose of assisting the district court in fashioning and effectuating a suitable remedy for Stevens' extensive unlawful employment practices found by the district court pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§2000e et seq. and 42 U.S.C. §1981.

3/ Stevens' bargaining tactics at Roanoke Rapids have been the subject of unfair labor practice charges resulting in a decision of the National Labor Relations Board holding that Stevens has not bargained in good faith since the Union was certified as the collective bargaining representative. J. P. Stevens & Co., Inc., 239 NLRB No. 95 (1978). Both the Union and Stevens have sought review of that decision. Amalgamated Clothing and Textile Workers Union, etc. v. NLRB, No. 78-4205 (2nd Cir.); J.P. Stevens & Co., Inc. v. NLRB, No. 78-1879 (4th Cir.).

Because of the importance of the questions which petitioners have presented for review, and particularly because the district court's inadequate claim filing requirement and restrictions on communication will have devastating and unlawful effects both in this case and in like situations, the Union supports petitioners' request that this Court review the opinion and judgment of the Fourth Circuit. Set forth below are additional reasons, fairly comprised within the questions presented by petitioners,[4/] supporting issuance of a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The district court's restriction on communications between the Union and class members respecting a subject of legitimate Union concern contravenes rights under the First Amendment and the NLRA and conflicts with applicable decisions of this Court.

The district court's ban on communications with class members initiated by parties and their counsel effectively

---

4/ Supreme Court Rule 23(1)(c).

stifles the free flow of information between class members who are in the bargaining unit and their bargaining representatives concerning the elimination of discrimination. This ban thereby affronts rights and interests under both the First Amendment and the NLRA. Because the Fourth Circuit failed to give due recognition to these rights and interests, its decision squarely conflicts with applicable decisions of this Court.

First, during the past two decades this Court has made clear that unions cannot lawfully be barred ". . . from giving any kind of advice or counsel . ." to workers concerning their legal rights and that such activity by unions is protected by the First Amendment. United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 580 (1971). Accord, United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 218 n.1 (1967); Bhd. of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1, 3-8 (1964); NAACP v. Button, 371 U.S. 415 (1963). See also In re Primus, 56 L.Ed. 2d 417, 428-31 (1978). If the First Amendment's freedom of association has any meaning at all, it is that persons in this nation may consult together for their common betterment. The restrictions on communication in this case, however, effectively chill the day-to-day personal contacts which the Union has found so useful in consulting with its adherents and in helping them to learn about their rights. Despite the fact that such union activity is at the core of the First Amendment's protection, the Fourth Circuit failed to give any meaningful

effect to this fundamental constitutional concern.

Second, the Union, as the certified bargaining representative of a substantial number of class members, has a statutory right under the NLRA to communicate freely with all members of the bargaining unit, including class members, concerning the conditions of employment in Roanoke Rapids. "The elimination of discrimination and its vestiges is an appropriate subject of bargaining. . . . ", Emporium Capwell Co. v. West. Addition Community Org., 420 U.S. 50, 69 (1975), and unions are therefore legitimately concerned about communicating effectively with those they represent with regard to race discrimination matters. Cf. Westinghouse Electric Corp., 239 NLRB No. 19 (1978); East Dayton Tool & Die Co., 239 NLRB No. 20 (1978). Therefore, responsibilities flowing from the status of statutory bargaining representative may well be affected by the broad restrictions upon the Union's correlative right to advise and consult with its members about matters of race discrimination in employment unless this Court reviews this case to give proper effect to the NLRA, as well as the First Amendment.

The practical effects of the district court's communications ban highlights both the First Amendment and NLRA problems. The subject matter of this case touches employee rights recognized by the NLRA and thus encompassed within the Union's duty of representation. The district court's restrictions on

communications, binding on the Union as an intervenor, places the Union in daily peril of violating either the district court's order or the Union's duty to represent fairly the interests of all employees in the certified bargaining unit (which unit is coextensive with the area of the ban in Roanoke Rapids).

Moreover, it is a central fact of industrial life that an employee's fear of retaliation for exercising a right against an employer, particularly this employer, is a real fear which has a chilling effect on the exercise of that right. Cf. NLRB v. Robbins Tire & Rubber Co., 57 L. Ed. 2d 159, 177 (1978) ("The danger of witness intimidation is particularly acute with respect to current employees . . . over whom the employer, by virtue of the employment relationship, may exercise intense leverage."). It is also an important fact of industrial life that workers are not ordinarily fully aware of their legal rights partly because their time is wholly committed to their jobs and their families. Restrictions on the Union, therefore, will effectively deprive class members of a key source of both education and group comfort regarding their rights.

Especially in the area of employment discrimination, face-to-face counselling is often necessary even to understand that one is being discriminated against. From the Union's long years of experience in the shop it knows that restrictions on the free flow of information concerning employee rights will likely have a debilitating effect upon the

role of private enforcement of the laws against race discrimination in employment. The associational and speech guarantees of the First Amendment, as well as the powers and responsibilities of a union under the NLRA, were designed specifically to encourage group consultation so that individuals who might otherwise be powerless by themselves can know and (if they deem it advisable) assert their rights.

Not even lip service is paid to these fundamental concerns in the opinion of the Fourth Circuit, and a writ of certiorari should be granted so that the workers in Roanoke Rapids can be assured of securing from their bargaining representative, as well as from their counsel, the advice, information and associational comfort to which they are entitled under the First Amendment and the NLRA.

II. The district court's use of an inadequate claim filing requirement, unaccompanied by effective advice and counsel, so far departs from appropriate Rule 23 practice in an employment discrimination case that the exercise of this Court's supervisory power is necessary in order to avoid a violation of the Fifth Amendment and a massive subversion of the purposes of Title VII and 42 U.S.C. §1981.

What distinguishes this case for review in this Court is its capacity for a massive

erosion of substantive rights not intended to be permitted under the guise of an adjective rule regulating class actions. The Union has already set forth its view, based on years of experience with workers like those in Roanoke Rapids, that without day-to-day and face-to-face advice and counselling employees are not likely to be able to make a knowing and intelligent response to the proof of claim form, much less decide whether or not to waive their Title VII rights. The powerful combination of a communications ban and an inadequate form for filing a claim portends a gutting of the role of private class actions in the enforcement of Title VII and 42 U.S.C. §1981, contrary to the intent of Congress.

In terms of the Fifth Amendment, unless this Court can say with assurance that the district court's order affords absent class members the best notice practicable under the circumstances, it should not permit the district court's claim filing requirement to go into effect unmodified. There is, quite simply, no assurance whatsoever that a claimant's waiver of his rights on the claim forms set forth in the petition for certiorari will be a knowing and intelligent one, as required by the decisions of this Court. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

Moreover, the likely substantive effects of this combination of a claim filing requirement and restrictions on the assistance of counsel draws into question the propriety of

the district court's procedure under the Rules Enabling Act, 28 U.S.C. §2072. Particularly in an employer-employee setting, where advice and comfort are needed in order to ensure a knowing and intelligent response to questions about race discrimination, is there a need for carefully conceived procedures which will not threaten either Fifth Amendment due process rights or the employee's substantive claims.

Because the district court's order, as affirmed by the Fourth Circuit, so far departs from appropriate Rule 23[5/] practice in employment discrimination cases and so far invades the substantive realm of Title VII and 42 U.S.C. §1981 in the guise of a mere adjective rule, this Court should exercise its supervisory power by granting the petition for a writ of certiorari to correct this serious situation.

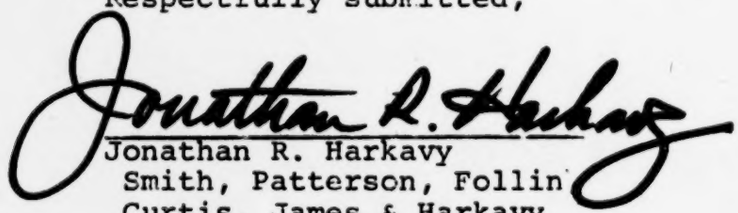
5/ Fed. R. Civ. P. 23

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

This 27th day of February, 1979.

Respectfully submitted,



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Supreme Court, U. S.
FILED
MAR 14 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1185

LUCY M. SLEDGE, *et al.*,
Petitioners

v.

J. P. STEVENS & CO., INC., *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY IN SUPPORT OF THEIR PETITION

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PETITIONERS' REPLY IN SUPPORT OF THEIR PETITION

Petitioners file this Reply to respond to some statements of the respondent J. P. Stevens & Co., Inc., which would otherwise give a misleading impression of the case.

First, the company characterizes the prohibition on party- and counsel-initiated contacts with class members as a "limited supervision" of communications, authorized by the court's power to prohibit "false or misleading" communications. This is wholly incorrect. Petitioners had requested both the district court and the court of appeals to limit the ban to communications which were clearly improper, such as "false or misleading" communications.[1] The district court refused to limit its pro-

[1] Petitioners have lodged with the Clerk of this Court a copy of pp. 168-86 of the Supplemental Joint Appendix in the court of appeals, consisting of petitioners' September 21, 1976 Motion to Amend and Supplement the Order Concerning Back Pay Entered Herein on September 10, 1976 (pp. 168-73), their proposed Amended

hibition in this fashion, and the court of appeals affirmed the refusal.

The issue presented to this Court, therefore, is the legality of an *absolute* ban on communications initiated by the plaintiffs and by class counsel, which by its terms makes no exceptions whatsoever. The ban on communications extends with equal vigor to the provision to class members of wholly truthful information about the case, of reasonable legal advice, or even of the text of the district court's findings of fact and conclusions of law.[2]

Second, the company argues, in effect, that claim-filing requirements are so frequent and so widely accepted that they are not worth the attention of this Court. It is true that the imposition of claim-filing requirements, and/or of gag orders on class counsel, have become much more frequent in recent years. If the practice is in violation of Rule 23, of the central statutory purposes of Title VII of the Civil Rights Act of 1964, or of the Constitution, however, the fact that the practice has been popular is no barrier to review. *Cf. Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 378-79 (1977) (Marshall and Brennan, JJ., concurring in part and dissenting in part).

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and Supplemental Order Concerning Back Pay (pp. 175-81), and their proposed amended form of Notice To Class Members Claiming Back Pay (pp. 182-86). The proposed amended form of Notice is also reproduced in an Appendix to this reply.

[2] The company argues that the theory underlying the ban is that petitioners and class counsel have a First Amendment right to further their associational goals by soliciting total strangers to initiate litigation, but no First Amendment right to further such goals by aiding the class members they already represent to enjoy relief after classwide discrimination has been found. Brief in opposition at 10-11. Neither court below addressed the theory underlying the ban, but the company's statement seems to be an accurate description of its operation. Whether this theory correctly applies the decisions of this Court is a matter that should be resolved by this Court

Moreover, the company has incorrectly characterized the law. It has deleted the words "intervene and" in its quotation of Rule 23(d)(2), F.R. Civ. P., to make it appear that the rule expressly authorizes nonfunctional claim-filing requirements. *Compare* brief in opposition at 12-13 *with* Rule 23(d)(2), set forth in the Petition at 6. The company's other citations are equally inapposite.[3]

Third, the company represents that the claim form ordered by the district court "is not essentially different

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[3] The company quotes the MANUAL FOR COMPLEX LITIGATION (1978) § 1.45, but the context of the quotation makes clear that the MANUAL was referring to claim-filing requirements "in cases in which the information is not otherwise available", rather than to the type of nonfunctional requirement at issue here.

Professor Moore no longer makes the same representations he made in 1969. 3B Moore's FEDERAL PRACTICE (1978) ¶ 23.55 at pp. 23-456 to 23-458 states that it is improper to bar claims at the pre-trial or trial stages because of silence by class members. Professor Moore would allow a claim filing requirement after the determination of liability, *id.* at p. 23-459, but nowhere states that he would allow such a requirement where it does not serve a necessary function.

Professors Wright and Miller do not recommended unrestrained use of claim filing requirements, *compare* brief in opposition at 14, but advocate a balancing test based on the importance of the function served by a particular filing requirement on the one hand, and the dangers of prejudice or confusion to class members on the other. 7A Wright & Miller, FEDERAL PRACTICE AND PROCEDURE (1972) § 1787 at 159-60.

Robinson v. *Union Carbide Corp.*, 544 F.2d 1258, 1260-61 (5th Cir., 1977), *cert. den.*, 434 U.S. 822 (1977), reversed the original decision of the panel, on which the company relies, and held that claim-filing requirements could be imposed only where, and when, "*necessary* for adjudication." (Emphasis in original). *Bing* v. *Roadway Express*, 485 F.2d 441, 448-49 (5th Cir., 1973), involved only a requirement that class members desiring to receive transfers to over-the-road driving jobs so indicate within a reasonable period of time. This is unexceptionable. In *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416, 422-23 (6th Cir., 1974), the court expressly noted that there was no challenge to the requirement that class members file claims, but only to the form of the notice given to them.

from what the plaintiffs requested in a Motion to Amend." Brief in opposition at 13. This is both misleading and inaccurate. The dispute concerns the form of notice to be provided to class members as well as the claim form, and it is clear that petitioners' proposed amended form of Notice would be far more helpful to class members trying to make a knowing and intelligent decision than the form approved below. *Compare* the Appendix hereto *with* Pet. App. 137a-141a.[4]

Fourth, the company urges that its record is not really bad enough to justify quota relief. This is incorrect. The district court's exoneration of "management" from conscious discrimination does not apply to the foremen, overseers and personnel officials whom it found to have engaged in *subjective*—by definition, *intentional*—discrimination. *Cf.* the district court's findings 21-24, Pet. App. 69a, with respect to such officials' use of their powers to discriminate, and findings 32-59, Pet. App. 72a-78a, entitled "The Reservation of Certain Job Categories to Whites, and of Certain Others to Blacks." These findings were affirmed. Pet. App. 15a.

Another strong indication of the company's record can be obtained from an analysis of its initial assignments, in 1975, to jobs which the district court found had been racially reserved up to the time of the 1972 trial. Such tabulations were done from petitioners' exhibit 133, and were presented to the district court before it decided the propriety of quota relief. These figures were never controverted, and showed that the company's performance, three years after the trial, was still the same as before:

[4] *See also* the papers lodged with the Clerk. To the extent that the company's brief in opposition implies that petitioners did not object to the claim-filing requirement in the district court, the implication is incorrect. Motion at 1, 6.

Initial Assignments in 1975 to Jobs
the District Court Had Found To Be Racially Reserved

Jobs	Racial Reservation	Number of Vacancies Filled	Number Filled By Blacks	Percentage Filled By Blacks
Clerical	For Whites	28	1	3.6%
Loom Fixer	For Whites	23	1	4.3%
Supervisor	For Whites	34	0	0%
Weaver (males)	For Whites	30	2	6.7%
Weaver (females)	For Whites until May 1969; integrated therafter	108	56	51.9%
Warehouseman	For Blacks	13	12	92.3%

Petitioners then analyzed the company's applicant/hire ratios for each race in the three years from the end of trial in 1972 until December 31, 1975. The statistics showing that the company had not improved its record are set forth in the Petition at 13, note 12. These figures, too, were uncontroverted.

The company's labor-force statistics were proven inaccurate in the proceedings on relief, and have been rejected by both courts below. Pet. App. 12a, note 16.

Fifth, the company attempts to portray the hiring quota ordered by the district court as unworkable, by presenting hypothetical situations which could never occur in reality. Brief in opposition at 5-6. The company hires approximately one thousand employees a year at these plants, and has a large-volume applicant flow there which is consistently in a range from 55% to 70% black. (Plaintiffs' exhibit 133; findings 25-28, Pet. App. 70a-71a). Given that the evidence of record shows that the defendant has clung to its old ways in the years after the trial, this case presents the question whether the district court abused its discretion by ordering, in a

workable and reasonable manner,[5] that blacks be hired at the same rate as whites.

Sixth, the company argues that the departmental seniority issue is virtually moot. Brief in opposition at 16-17. This is incorrect. Departmental seniority is still in force at the plants involved in this suit, and collective bargaining cannot be relied upon to end it.[6] Even if it were ended prospectively, the legality of the company's seniority system would be important to the adjudication of the back pay claims of class members whose original departmental assignments to low-paying departments were outside the period of limitations, and which were perpetuated by the company's requirement that seniority be forfeited upon transferring departments.

CONCLUSION

Review of the questions raised in the Petition is appropriate at this time. This is particularly true for the questions involving the claim-filing requirement and the ban on communications with class members.

After the conclusion of back-pay proceedings, it is highly doubtful that the district court would relax the ban on communications and allow petitioners to contact nonfiling class members to determine the reasons for their failure to file. It is also highly doubtful that the district court would schedule evidentiary hearings, at the end of the case, to allow petitioners to compile a record demonstrating the prejudice caused by the procedures

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[5] The court of appeals did not base its reversal of quota relief on any perceived problems of workability, and held generally that such problems should be presented to the district court if in fact they ever materialize. Pet. App. at 31a.

[6] The union was certified in 1974, but has not yet been able to obtain a contract. The company has recently been found to have failed to bargain in good faith. *J. P. Stevens & Co., Inc.*, 239 NLRB No. 95 (1978) (review pending).

here drawn in question. By their nature, an actual demonstration of the prejudice they cause will forever lie beyond petitioners' grasp. If the questions raised by petitioners are to be resolved by this Court, they should be resolved in the present posture of this case.

Petitioners pray that their Petition be granted.

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March 1979

APPENDIX

[Caption Omitted]

TO: ALL BLACK PERSONS WHO APPLIED FOR JOBS AT THE ROANOKE RAPIDS PLANTS AND OFFICES OF J. P. STEVENS & CO., OR WHO WORKED THERE, ON OR AFTER OCTOBER 2, 1967

The purpose of this Notice is to describe the matters involved in this racial discrimination case against the company, and to state what present and former black applicants and employees must do to protect any rights they may have to an award of monetary relief ("back pay") in this case.

NOTICE IS HEREBY GIVEN THAT:

A. *Description of the Case*

On October 2, 1970 a civil action was filed in the United States District Court at Raleigh by Reginald Harrison, Lucy Sledge and others as plaintiffs against J. P. Stevens & Co., Inc., as defendant, seeking relief under Title VII of the Civil Rights Act of 1964. This law prohibits, among other things, discrimination in employment on the grounds of race or color. During the pendency of the action the plaintiff Harrison withdrew from the suit, and it was thereafter prosecuted by Lucy Sledge and eleven other named individuals under the title as shown above on behalf of themselves and members of a class defined by an order of the Court as follows:

> "(a) All Negroes employed at all the Roanoke Rapids plants of J. P. Stevens & Company, Inc., on and after October 2, 1967; and
>
> "(b) All Negroes who have applied for employment at said Roanoke Rapids plants since October 2, 1967, who claim to have been affected by the

alleged racially discriminatory employment practices of the defendant."

On December 22, 1975, after a full trial, the United States District Court in Raleigh decided that the company had discriminated against black applicants and employees in the following ways:

a) *Hiring*: Although qualifications play a minor role in the defendant's hiring process and there is no evidence to show that blacks do more poorly than whites on the rudimentary pre-employment tests administered by the company, it hires a substantially higher percentage of white applicants for employment than of black applicants.

b) *Delaying the Hiring of Black Females*: Black females are discriminated against in having to wait longer than white employees from the date of their first application to the date of their hire.

c) *Lack of Standards for Making Personnel Decisions*: The company's failure to establish objective, formal guidelines for hiring, promotion and transfer within its plants is discriminatory.

d) *Reliance on the Opinions of Supervisors When Making Personnel Decisions*: The company's policy of relying almost exclusively upon subjective conclusions of its all-white overseers and personnel officials in hiring and promotion is discriminatory.

e) *Clerical and Supervisory Jobs*: The defendant has reserved its clerical jobs and substantially all of its supervisory jobs for whites.

f) *Weaver and Fixer Jobs*: The jobs of weaver and fixer, which are relatively high-paying jobs, were reserved almost exclusively for whites prior to May of 1969, and discrimination against black males in assignments to these jobs has continued.

g) *Warehouseman Jobs*: The defendant has reserved the comparatively low-paying job of warehouseman for blacks.

h) *Blacks are Assigned to Lower-Paid Jobs*: The average black male hourly employee of defendant is paid substantially less per hour than the average white male hourly employee and the differences generally became larger in the period between 1967 and the time of the trial. The company has assigned a smaller proportion of black women than of white women to its highest-paid jobs for women. These findings are true, regardless of the education, previous employment experience, or seniority of the employees in question.

i) *Blacks are Initially Assigned to Lower-Paid Departments*: Newly-hired black males are assigned more frequently than whites to lower-paying departments.

j) *Failure to Post Notices of Job Vacancies*: One of the reasons blacks have remained in lower-paid jobs than whites was the company's failure to post notices of job vacancies. Because of this, many employees did not know when vacancies in higher-paying jobs came open in their own departments or in other departments, and were unable to request that they be considered for such vacancies.

k) *Departmental Seniority*: The company's departmental seniority system is discriminatory in that an employee who changes departments loses departmental seniority in his or her old department and thus runs a greater risk of lay-off by transferring than he would by remaining in his old department. This discourages transfers between departments, and a black male discriminatorily assigned to a low-paid department suffers reduced opportunities for

a good paying job after his original discriminatory departmental assignment.

1) *Layoffs and Recalls*: Blacks are discriminated against in layoffs and recalls.

The Court has now issued a Decree which has permanently enjoined the defendant, J. P. Stevens & Co., Inc., from engaging in any act or practice which has the purpose or effect of discrimination against any individual, whether employee or applicant for employment, because of his or her race, at any of its facilities in and around Roanoke Rapids, North Carolina. The company still denies that it has discriminated, and has appealed the Court's entry of the Decree to the United States Court of Appeals in Richmond.

This Notice has been issued because the lawsuit is now moving into the "back pay" stage, in which the Court must decide which black applicants and employees, who applied or were employed on or after October 2, 1967, are entitled to monetary awards and the amounts to which they may be entitled. The purpose of this Notice is to tell such black applicants and employees what is involved and how to press any rights to monetary relief they may have.

B. *Protection of Rights to Monetary Relief*

If you want to preserve whatever rights you may have to a back pay award in this case, you must write the Clerk of the United States District Court in Raleigh and state that you want to be considered for a back pay award and that you are willing to come to Court and testify about the claim if you are asked to do so. (The hearings would probably be held in Roanoke Rapids, but the Court may arrange for them at some other place.) Your name, address and telephone number (if any) must be stated. If the Clerk does not receive your statement within 30 days after this Notice is first published in the Roanoke

Rapids *Herald*, you will lose whatever right to an award of back pay you may have had in this case. If a class member proves that he or she did not learn of this Notice in time to file a statement by the deadline, and notifies the Clerk of this problem within a reasonable time after the deadline, an exception may be granted. The name and address of the Clerk are stated at the bottom of this Notice, and each letter or card must state the name of this case: *Sledge* v. *J.P. Stevens & Co.*

Persons who receive this Notice by mail can make this statement by filling out and mailing the postcard which is enclosed with the Notice. For present and former black applicants and employees who read about this Notice in the local newspaper, postcards can be obtained at the company's Personnel Office and at the Textile Workers' Union Hall in Roanoke Rapids.

If you believe that the company treated you differently than it treated whites, and that as a result you have lost earnings you would otherwise have had, you may have a back pay claim. Some examples of possible claims are:

a) If you applied for a job and were not hired, at a time when whites were being hired.

b) If you applied for a job and were hired after a long delay, at a time when whites were being hired without long delays.

c) If you were hired and assigned to a low-paying job, at a time when whites were being assigned to higher-paying jobs.

d) If you were assigned to a predominantly-black department, at a time when whites were being asigned to better-paying departments.

e) If you were not given a promotion to a better-paying job, at a time when whites were being hired or promoted into better-paying jobs.

f) If you changed departments, lost seniority, and the lost seniority hurt your chances of getting a promotion.

g) If you changed departments, lost seniority, and the lost seniority resulted in your being laid off sooner, or recalled later, than you would have been laid off or recalled if you had kept your seniority.

h) If you were treated differently than whites in any other way, and the different treatment made your earnings less than they would otherwise have been.

If you believe that you may have a back pay claim, you must then decide for yourself whether you want to drop it, or go ahead with it.

It is not necessary to know all of the facts about your claim before sending in the statement to the Clerk of Court. Many facts taken from the company's personnel records and pay records are already before the Court, and the lawyers for the plaintiffs will help investigate the facts of every claim which is raised in this case.

It is possible that you may have a legally valid back pay claim but not know it because you don't have personal knowledge of all of the relevant facts. If you send the statement to the Clerk of Court, this will preserve whatever rights you may have, and the attorneys for the plaintiffs will then help investigate your situation and press any back pay claim you may have.

It is not necessary to hire a lawyer in order to send in this postcard or to press a back pay claim against the company in this case. If you submit the statement to the Clerk of Court, you will automatically be represented by the attorneys for the plaintiffs, without charge to you. They are:

Richard T. Seymour
316 Southern Building
1425 H Street, N.W.
Washington, D.C. 20006

T. T. Clayton
Clayton & Ballance
307 West Franklin Street
Warrenton, North Carolina 27589

You may contact them if you have any questions. If you prefer, you may retain your own lawyer to represent you with respect to your back pay claim.

If you are the relative of a class member who is deceased, or are the executor, administrator or residual beneficiary of the estate of a deceased class member, you may be able to press the back pay claim of the deceased class member. If you desire to do so, the statement should state the name of the deceased class member, the fact that he or she is deceased, and your name and address.

Finally, you should know that the law prohibits the defendant from taking any action against you for filing a statement with the Clerk or for pressing a back pay claim against the company.

Please save this Notice for future reference. If you know of any present or former black applicant or employee who is within the Court's definition of the class but who did not receive this Notice, please bring it to his or her attention.

Dated:

Street Address:

7th Floor, Federal Building
310 Bern Avenue
Raleigh, North Carolina 27611

JOHN R. WHITTY, Clerk
United States District Court
P.O. Box 25670
Raleigh, North Carolina 27611